Civilizing Nature
Revisiting the Imperialist History of International Law
1511-1972

MANUEL JIMÉNEZ FONSECA

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To the peasants of Vallecito (Honduras) who taught me about life and love
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Introduction

I

The degradation of the environment is probably one of the most pressing questions that humanity currently faces. As a global phenomenon, it also represents a big challenge for the discipline of international law, which in the last decades has also tried to come to terms with the threatening fact that nature is being destroyed at an unprecedented speed. Almost every day there is new data on the human impact on nature.\(^1\) More than any other ecological challenge, global warming has been the top contributing factor in squarely placing the state of the environment right at the top of the international community’s agenda.\(^2\) Climate change, however, is just one of several harmful ecological processes affecting the Earth’s ecosystems. Desertification, loss of biodiversity, destruction of maritime life, acidity, deforestation, etc. have all negatively affected the state of the global environment. Two scientific reports have recently raised alarm that the worldwide impact of human activities has reached the threshold at which it threatens to destroy the most fundamental of Earth’s support systems.\(^3\) In other words, current levels of human-induced environmental degradation endanger the viability of human life on Earth, now and in the future.

The United Nations already as far back as almost half a century ago recognized the existence of a global ecological crisis.\(^4\) However, in spite of increasing environmental awareness and decades of

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\(^1\) On the 15\(^{th}\) of February 2016, we learnt that by 2050 there will be more plastic than fish in the sea (amounts measured by weight). See http://www.bbc.com/news/magazine-35562253 (in the article, the BBC news referred to information that appeared in a report of the World Economic Forum). See The New Plastic Economy: Rethinking the Future of Plastic, World Social Forum (January, 2016) 7. Only five days later, on the 20\(^{th}\) of January 2016, it was reported that 2015 had been the warmest year ever recorded since 1850 (0.75 °C warmer than the average temperature in the period 1961-1990). For more details on the study, see http://www.metoffice.gov.uk/news/releases/archive/2016/2015-global-temperature.


international environmental negotiations and regulations, the destruction of the environment continues unabated. The global capitalist economic system that accounts for the unsustainable exploitation of the Earth’s resources has proven resilient to change.\(^5\) This situation has led some to argue that the experiment of global environmental governance, which states have embarked on since the Stockholm Conference, has largely failed.\(^6\) In fact, the proliferation of international environmental treaties and regulations has not had a tangible effect in the state of the global environment.

The reasons for these failures are both complex and multifaceted—perhaps as complex as the creatures that are responsible for them. The role of international law in these failures is beyond the grasp of any single study. However, the present work is informed by the conviction that an understanding of international law’s historical engagement with nature, and concretely with non-European ecosystems, can illuminate—if indirectly—the present, thus, offering hints about how to begin to tackle the question of why international law is unable to put an end to the human destruction of natural habitats. It can also challenge the positive association of international law with nature—epitomized by international environmental law—that presents the former mainly as a vehicle for the protection of the latter.

International law does protect the Earth’s flora and fauna. But, at the same time, it also enables the privatization of land and natural resources, the commoditization and commercialization of natural species, and the extraction of valuable minerals resources (sometimes at a high environmental cost).\(^7\) Without international norms that facilitate these processes, nature could not be exploited to satisfy the demand of global markets and the particular economic interests associated to them. For this reason, my study attempts to unearth the historical role that international law has played in the emergence of the very socio-economic dynamics, structures, and processes whose devastating effects on nature it now tries, to a certain extent, to keep under control.

\(^5\) And this despite the fact that this system is also responsible for widespread human inequality, which according to the last Human Development Report hinders the improvement of standards of living for the 2.2 billion people living in poverty. See Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience, Human Development Report 2014 (New York, United Nations Development Program, 2014) 36-41.


International legal historiography has experienced a considerable revival since the publication of Martti Koskenniemi’s seminal *The Gentle Civilizer* and Antony Anghie’s groundbreaking *Imperialism, Sovereignty and the Making of International Law*. Edited volumes have recently also explored in depth the contributions of the most influential figures in the development of international law to the legal evolution of particular ideas, institutions, and vocabularies across the globe. In addition, several individual works have contributed to broadening our understanding of the history of international law. Still, despite this increasing attention to the past of the discipline, the historical engagement of international law with nature remains largely undertheorized. Nevertheless, the history of international law necessarily encompasses a broad range of inquiry. So, where to start this analysis?

In the conclusion of his critical work on the history of international law, Anghie speculated about the possibility of writing the—colonial—histories of different branches, doctrines, and concepts of international law, such as humanitarian law, human rights law, property law, sources doctrine, good governance, contracts, etc. According to Anghie, analysis of the discipline’s past could potentially shed light on the historical formation of legal techniques and vocabularies of imperial domination that have historically led to widespread social inequality, exclusion, and, hence, human suffering.

Inspired by Anghie’s invitation to investigate the influence of European imperialism on different areas of international law, the present study revisits the imperialist history of the discipline in order to analyze its environmental dimension. Underlining the importance of imperialism in understanding the history of international law, Mickelson has similarly claimed that ‘a historical context’ of ‘international environmental law’ that fails to include the colonial period is a truncated one. However, the historical

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emergence of environmental law has been sufficiently historicized, and the colonial past does not offer many elements for explaining the emergence of environmentalism and its translation into legal jargon in the last decades of the twentieth century.

Still, information about the alarming pace at which humans are destroying the environment suggests that something has gone wrong in the way humans had historically built their relationship with nature. Due to the importance of European colonialism in shaping the way in which the world was knitted together, one feels compelled to look at this long episode of human history in search for answers. In a world of rampant environmental degradation and social inequality (it has been predicted that by 2016 the richest 1 percent of the world population will have the same wealth as the 99 percent poorest) it seems sensible to examine the historical formation and effects of legal rules and theories that facilitated the extension of certain economic practices over the Earth as well as the exploitation of its natural wealth.

While critical scholars from various streams of thought have illuminated how during the course of European colonialism non-European peoples were included and excluded from the realm of international law and how the latter was deployed in order to control and dominate non-European populations, there is still a need for a more in-depth understanding of the impact that international law has historically had on non-European ecosystems. Imperialism was largely driven by the intention of acquiring natural resources in overseas territories and getting access to profitable trading routes. These activities produced dividends of immense value to imperial powers. It is by now clear that international law created a vocabulary to justify imperial rule and the economic activities of European colonists, but the effect of that vocabulary on nature and its importance as a legitimating tool of Empire has not yet been sufficiently explained. Was the appropriation of non-European ecosystems a side effect of the historical legitimization of imperialism or, conversely, did it occupy central stage in the development of legal arguments, theories, and doctrines of imperial rule?

This work offers a two-fold perspective to explore the historical relationship between international law and nature. It contends that the law of nations and international law were often used to legalize the privatization and commodification of natural elements. International law and its old relative offered

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‘authoritative vocabularies’ of private economic rights—namely private property rights, the right to trade, and the right to occupy—applicable to inter-commonwealth relations.16

Louis Warren has aptly described private rights (from an environmental perspective) as an ‘expression of how natural goods can be conceptually separated from the earth and tied to people’.17 In the context of European imperialism, in which the production, extraction, and exchange of natural products created enormous dividends, private rights became crucial. They helped separate an ever-increasing amount of natural goods from the Earth, tying them to an elite group of international economic operators. International law and imperialism contributed to the ‘material appropriation’ of non-European nature through the universalization of private economic rights, as well as their geographical dissemination.

International law provided the legitimizing vocabulary that allowed the seizing of natural elements in a concrete, material sense. The right to private property also disentangled the individual from the realm of nature. Humans were no longer ruled by nature; it was now nature that was under human power—if not in practice, then at least on a conceptual level. The institutional mechanism of individual ownership transformed humans from being a mere part of nature (being in nature) to being—if illusorily—the rightful owners of the Earth (being over nature). While private property placed nature in the hands of particular human beings, the right to trade allowed it to be assigned an economic value, and thus become a source of wealth. Once transformed into objects of possession, natural elements could be commodified and exchanged for a monetary value. The development of particular legal theories that fostered the universalization of private economic rights during the era of European imperialism, normalizing their application as a way to relate to nature, helped the global process of appropriating different ecosystems and transforming the Earth into a source of economic value.

This is only half of the story. Private rights could have been introduced in the colonies without the need of transferring non-European ecosystems into the hands of the colonists. However, that possibility would have betrayed the main motivation of colonialism. If European imperialism was to be economically profitable and enrich the metropolis, Europeans ought to have a preponderant access to the land and natural resources of the colonies. Then, if that was the ultimate goal, how could Europeans deny the populations of Latin America, North America, the East Indies, Australia, etc. the use and exchange of the natural elements in the vast territories they inhabited? In fact, non-Europeans had been in control

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16 For the historical importance of this vocabulary in understanding the phenomenon of imperialism see Martti Koskenniemi, ‘Empire and International Law: The Real Spanish Contribution’ 61 University of Toronto Law Journal (2011) 1-36.
of those resources for millennia before the arrival of European colonists, and even under the alien regime of private rights brought by Europeans they could have continued to do so.

It was obvious that Europeans wanted to appropriate the natural resources of the colonies. Yet, the question remained, why would they have a better entitlement to non-European ecosystems than non-Europeans would? International law helped answer that question by articulating a theoretical justification for European appropriation. Scholastics, natural lawyers, and international lawyers either developed or incorporated in their legal treatises theories that explained the socio-economic development of different peoples by reference to their capacity to exploit their natural surroundings. Non-Europeans’ backwardness, primitiveness, and stagnation was largely predicated on their inability to exploit nature and to civilize it, that is, to govern and convert wild nature into a sound civil society. In contrast, Europeans’ mastery of nature proved their progressive character and superiority.

The degree of modification of non-European ecosystems became a hallmark that was used to define the social development of the peoples that inhabited them. Europeans constantly found an invented wilderness in the colonies that, by extension, defined the character of the peoples that inhabited it. At the same time, this standard of judgement also worked the other way round. Often, the alleged backwardness of non-Europeans became the vivid proof that their natural environments were also in a wild condition. And, because for Europeans the utilization of the Earth was the cornerstone of human development and a sacred Christian mandate enshrined in the Bible, there was a compelling need to put the underutilized resources of non-European territories into production. Importantly, for Europeans it was clear that they were best suited for the task.

By defining the right use and the right user of the world’s natural resources, international law contributed to the ‘conceptual appropriation’ of non-European nature. It created a conceptual prism through which to look at non-European natural habitats, classifying and assigning a series of legal entitlements over them. Importantly, this prism was also inextricably linked to the social condition of non-European populations.

The material and conceptual appropriation of nature functioned together. The latter provided a set of ideas that made the former possible. Still, the way in which the legitimization of the material and conceptual appropriation of non-European nature took place throughout the colonial era was different in different periods. While there are notorious parallels in the manner they operated in different historical contexts, there are also important differences that make each period unique. Following a temporal line
allows this study to create a narrative that pinpoints relevant continuities while paying attention to context and, hence, acknowledging the discontinuities inherent in the complexity of the colonial past.

Accordingly, this study is divided in five parts. The first part consists on an environmental history of Western imperialism. Part I lays the ground for the other four parts, which follow a historical trajectory. In turn, each part contains two chapters. Part II of the study looks at the Spanish colonization of Latin America. While Chapter 2 is dedicated to the legitimization of the material appropriation of Latin American ecosystems, Chapter 3 explains how Latin American nature was appropriated in a conceptual sense. Part III of the study is structured along the same lines. In this case, the geographical focus moves to North America and the East Indies, and the temporal focus to the seventeenth and eighteenth centuries. Chapter 4 dwells on the material appropriation of non-European environments during the seventeenth and eighteenth centuries, and Chapter 5 examines the conceptual appropriation during the same historical period. But Chapter 5 also introduces a change into this narrative. It expounds how during the European Enlightenment the material and conceptual dimensions of the European appropriation of non-European nature fused. Both strands functioned together as part of a socio-economic and environmental theory of historical development, known as stadial theory, which informed the occupation of non-European territories.

The fusion of the material and conceptual perspectives in a progressive philosophy of history and especially the translation of the latter into a legal theory of occupation was vital for the legitimization of the appropriation of non-European territories, particularly during the first half of the nineteenth century. Accordingly, Part IV shifts its attention to the phenomenon of settler colonialism. Chapter 6 examines the theoretical foundation of this phenomenon, focusing on the evolution of the doctrine of occupation and stadial theory from 1900 to 1950. Chapter 7 complements this perspective by looking at how these philosophical and legal theories were applied in practice in the settler colony of New South Wales and the U.S.

The last part of the study, Part V, explores the phenomenon of Western imperialism at the turn of the twentieth century. Chapter 8 clarifies the changing nature of the doctrine of occupation in its application to Africa, a change that posed a considerable challenge to the way in which the appropriation of non-European nature had been previously justified. Chapter 9 elucidates how this challenge was met through legal evolution. The translation of the social implications of this idea into a program of colonial administration resulted in the creation of a dual mandate. Chapter 9 explains how one of the two social spaces that materialized because of the fulfilment of this mandate provided an ‘economic/environmental’
sphere of action in which the *homo economicus* could freely continue exploiting nature in order to fulfil the cosmopolitan aspiration of engendering progress.

III

History has become increasingly relevant to critical analyses of international law. This critical perspective, which started in the late 1980s with the work of authors such as David Kennedy and Martti Koskenniemi, shocked the identity of the discipline by challenging the very objectivity and neutrality of international law.\(^{18}\) Since then, critical scholars have attempted to dispel the illusion that international law is a rational and progressive instrument for ordering international life and controlling its most irrational tendencies. For these authors, international law is both a reflection of the structural power dynamics that characterize the contemporary world, as well as a constitutive element of those very dynamics. As an ‘authoritative vocabulary’, it can be used to further different agendas and interests. So, a relevant part of the work of critical scholars has consisted in engaging with the question of who uses international law, for what purposes, as well as who is excluded from its use.

A decade after the first wave of critical studies in international law, part of this scholarship turned its attention to history.\(^{19}\) This was a logical move because the identity of international law is not only related to its contemporary substance and function but also to its role in shaping recent human history. The idea we have about what international law ‘is’ is inextricably linked to what we think it has ‘been’. For this reason, critical scholars set to debunk a series of myths that have traditionally influenced the perception of the development of international law. One such myth presents the discipline as an instrument of progress.\(^{20}\) One of the results of this myth has been to conceal the relationship between international law


\(^{19}\) See *supra* footnotes 8 and 9. This turn was part of a larger trend whereby scholars increasingly engaged with the history of international law. See Matt Craven, ‘Introduction: International Law and its Histories’ in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden, Martinus Nijhoff Publishers, 2007) 1-26.

and Western imperialism, a relationship that is crucial to understanding the emergence of international law.21

The present work is situated within the contemporary corpus of critical international legal historiography and, particularly, Third World Approaches to International Law (TWAIL). In line with the latter, one of the main goals of this work is to show how international law has contributed to shaping the relationship between the West and the non-West (be it nations, communities, territories). This is no neutral enterprise, as that relationship has been historically characterized by an asymmetry of power. In other words, international law has often been—if unintentionally—a vehicle of domination and oppression, having a very tangible and detrimental effect on the lives of hundreds of millions of people.

This study is informed by the conviction that one of the basic elements of the structural power asymmetries that currently shape global life is the West’s environmental hegemony over non-Western territories. By environmental hegemony, I understand the capacity of the West to appropriate nature—land and natural resources—in Latin America, Africa, and Asia, and also its capacity to define how nature and resources ought—and ought not—to be used. That hegemony is no new phenomenon: it has been historically built throughout the colonial period, and international law has been an important factor in its genesis. It is then an urgent task—and the goal of my dissertation—to explore how imperialism and international law contributed to Western environmental hegemony.

But why does history matter? Why is the past still relevant? And, importantly, how does the present work intend to conduct a critical inquiry into the past? These are relevant questions to answer before I move on to explain some of the implications of this study.

At the end of the nineteenth century, Sigmund Freud revolutionized the understanding of the human mind with his study of the unconscious. Freud found out that the extent of the mind that humans can consciously access is only part of a larger whole. A big portion of the human mind, he claimed, remained unconscious, and thus mostly inaccessible. The realm of the unconscious was formed by repressed ideas, emotions, impulses, and desires which, no matter how repressed they were, still had a huge influence on people’s lives. This meant that, without understanding the influence of the unmanifested dimension of the mind on peoples’ lives, humans were missing fundamental information about their ‘real’ self.

21 Anghie’s work on imperialism has been fundamental to dispel ‘the myth of Westphalia’, the narrative that situates the emergence of international law in a European context, thus obviating the imperialist dimension of the discipline. See supra footnote 9. See also, Antony Anghie, ‘Towards a Postcolonial International Law’ in Prabhakar Singh and Benoît Mayer (eds.), Critical International Law (Oxford, Oxford University Press, 2014) 123-142.
But Freud’s unconscious had another vital component. A very important part of what is repressed is composed of painful memories. According to Freud, the human mind represses traumatic experiences, storing them in the hardly accessible unconscious realm. For this reason, a fundamental part of the work of psychoanalysis, the science that Freud helped build, was trying to make the repressed memories come to the surface of the mind, and hence bringing them to consciousness. Only by bringing the past back and understanding it, no matter how painful that past was, could the individual liberate from its influence and take full control and responsibility of her/his life. As long as the past remained hidden and unconscious, the individual was doomed to repeat the same emotional patterns and roles, moving in circles.

For the same reason that the comprehension of our life’s story is vital to our present, understanding the history of how our globalized world came about politically, economically, socially, etc. is vital to having a better grasp of contemporary life. This is so because, in the collective realm as in the personal, only what is revealed can be made conscious, understood, and transformed. How can we suitably tackle the roots of poverty if we are convinced that it is the result of laziness or ignorance, for example, rather than the product of a particularly complex set of structural historical processes, a crucial part of which is Western imperialism? How can we stop degrading life-support systems if we do not understand why and how we started destroying nature in the first place? These are big questions with no easy ready-made answers, but, in my opinion, only their inquiry can help us respond to the most urgent challenges that humanity faces at present. Without that information, it is likely that the recipes we prescribe as cures are, at best, innocuous and, at worst, will aggravate the problem.

Even if the history of international law is considered a relevant undertaking, there is still a need to explain how this study has approached it. As with most critical scholars doing history, the present work underlines continuity. In concrete, it traces the historical trajectory of the persistent idea that the colonial exploitation of non-European nature was key to human progress, and that the institutions of trade, private property, and occupation that the law of nations and international law universalized were the most suitable instrument to realize the cosmopolitan mission of exploiting the underutilized natural resources of the world.

History is a vast universe. Only by understanding the incommensurable complexity of a single human life can one start to comprehend the infinite intricateness of the past and the multiple challenges of its study. Like a kaleidoscope, the past is an almost endless canvass with myriad lenses whose rotation show different ‘parallel universes’. Focusing on continuity is a political choice that stems out of a personal
sense of urgency derived from the conviction that similar patterns to those described in the book are currently negatively affecting nature as well as a large part of humanity. In the closing chapter, I will outline a possible line of inquiry to explore these contemporary trends.

But focusing on continuities and tracing the intellectual history of a particular set of ideas does not mean that context and discontinuity are not important. In fact, attention to context is the best way to trace the evolution of the underlying assumptions about non-European nature and non-European peoples that have informed the development of international law. Besides, recognizing discontinuities can only enrich the analysis and make it more nuanced. For example, a very tangible challenge to the kind of continuity to which this study is devoted (one that underlies the contribution of Western scholars and intellectuals to a series of interventions in non-European territories that resulted in environmental degradation and social domination) is the fact that some of the protagonists of this study were also concerned about the destruction of nature and the violence of imperialism.

So they, for example, raised alarm about the environmental consequences of industrialization, or underscored the need for conservation in their home countries or the colonies. To a certain extent one could pick some of the same authors analyzed in this study and construct a rather different historical narrative. In the conclusion, I will engage with this fact and try to assess some of the implications of conservation for non-European peoples.

Despite its focus on nature, this research is not only an environmental study. The double perspective that informs it, the distinction between the material appropriation of nature and the conceptual appropriation which helps in articulating the thesis, allows also to pay attention simultaneously to two general impacts of Western imperialism: one environmental, the other social. On the one hand, through the legitimizing role of the law of nations and international law, imperialism contributed to the localized degradation of non-European ecosystems. This aspect of the study will be the focus of Part I, which consists of one chapter. Devoted to a summary exposition of colonial environmental history, Chapter 1 will also seek to establish the link, if indirect, between that history and the history of international law.

On the other hand, the focus on the material and conceptual appropriation of nature, a part of which was the justification of the transfer of natural resources from non-Europeans to colonists, helps elucidate the impact that the justification of Western interventions on non-European ecosystems had on non-European societies. An important social effect of the transfer of resources was that non-Europeans lost control over their means of subsistence, affecting their social well-being. And even when non-Europeans were allowed to keep what they possessed, and were therefore given a chance to subsist, they lost access
to most of their continents’ natural wealth, a fact that limited the horizon of possibility for their societies to attain the good life.

The fact that the conceptual appropriation of non-European nature was based on non-Europeans’ incapacity to master natural habitats had important social ramifications. European commentators believed that non-Europeans were still fused with nature. In some cases, non-Europeans were completely assimilated to their surroundings and often compared to animals. Most frequently, they were placed in a continuum with nature, not completely identified with it, but neither clearly differentiated. While European societies were judged to have completely emerged from nature, in the colonies the social realm was still deemed to be enmeshed with the natural sphere. Once reality was artificially constructed this way, European imperialism naturally became the most suitable instrument to operate that separation.

The belief that non-Europeans' relationship with nature was obsolete and retrograde, and the violence with which imperialism sought to correct that imbalance had a psychological effect on non-European peoples too. The inferiority of their social condition predicated on their way of relating to nature did not only affect their productive systems and the elements of their cultures related to them. It also penetrated deeper into the texture of non-European societies, challenging their very worldviews: the place they assigned to nature in their social world and the way they thought peoples and nature ought to relate. Besides, the alleged non-European inferiority in mastering nature affected non-Europeans' possibilities of resistance, as any attempt to fight Europeans in order to protect their sources of provision could be judged as opposition to a progressive use of the same resources. For the Europeans, defending ‘wilderness’ (as they thought non-Europeans did when they defended their territories and ways of live) amounted to opposing the unfolding of history, understood as a continuous trajectory of human betterment, progress through the domination of natural laws and natural forces, and the projection of human productive power over nature.

Due to the twofold social and environmental lens of the research, this work is not only an attempt at identifying an understudied area of international legal history and at least partly filling this gap, but it also (and perhaps more importantly) constitutes an effort to offer a novel prism with which to look at the whole phenomenon of Western imperialism and international law’s contribution to it. Nature was at the center of legal doctrines and theories of imperial rule. Moreover, its variants as the evangelizing mission and the civilizing mission (to which theorists of imperialism constantly refer) were not only operations intended to reform non-European peoples. Because people and nature were placed in a continuum, the mission to introduce progress in the colonies entailed governing and civilizing both people and nature.
The imperialist mission of uplifting backward non-European peoples and taming non-European wild natural habitats were two sides of a single colonial project that ran like a thread across time and space throughout Western colonial history. They were part of the same effort, oriented to reforming and governing the natural-social wilderness outside Europe. And that mission was predicated on what Anghie has called the dynamic of difference, the subordination of non-European peoples to Europeans, a hierarchy that stemmed partly from an assessment of non-Europeans’ capacity to master nature.

This is, indeed, an ambitious project, one that temporarily runs from Montesino’s speech in Hispaniola in 1511 to the Stockholm Conference in 1972, and geographically covers from America to the East Indies, Oceania, and Africa. Despite ambition of scope, the present work does not claim to have exhausted the subject matter. On the contrary, by having revealed and start mapping a large conceptual area that had remained largely unexplored, it hopes only to have opened a new window into the past and to offer a novel prism to look at it.

IV

One of the challenges of writing international legal history, and any academic work for that matter, is overcoming the biases of the vocabulary at our disposal. The language that we use to reflect on legal history has been shaped by power structures related to imperialism, gender, race, class, etc. that have been more easily challenged in practice than in linguistics.22 The use of the plural form of the masculine noun ‘men’ to designate both men and women is one of the clearest reminders that the power structures of the past are still part of daily communication. And even if it seems just a symbolic gesture in redressing this gender imbalance, I have decided to substitute ‘men’ as an indicator of both genders for more inclusive terms such as ‘humans’ or ‘human beings’. This decision could of course be presented as a cosmetic choice with no influence on and engagement with the social world in which power dynamics are constructed and gender dynamics operate. This is a fair criticism from a practical perspective, but the act of naming differently is a political act nonetheless, one that I feel is still important to maintain.

There is also the issue of how to refer to non-European territories, political entities, cities, etc. Many of their pre-colonial names have been substituted by denominations in European languages, be it Spanish,

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22 The linguistic legacy of imperialism in the African context has been famously raised in Ngũgĩ wa Thiong’o, Decolonizing the Mind: The Politics of Language in African Literature (Nairobi, East African Educational Publishers, 1986).
English, French, Dutch, etc. I have tried, as much as possible, to retain pre-colonial denominations. Similarly, finding the right term to refer to the societies that came under European rule has proven difficult. Part of this difficulty lies in the fact that there were thousands of political formations in the continents that the Europeans colonized. Placing societies as distinct as the Mexica, the Kayapo, the Zulus, the Comanche, or the San under a generic name does not do justice to any of them. In addition, there were often no pre-colonial generic names to designate the continents or groups of people that Europeans conquered. Each society had its own terms, so there were a variety of denominations.

Despite all these challenges, an analysis that explores continental or even global processes faces the necessity of using a general vocabulary, at least to a certain extent. But when naming the non-European societies under colonial rule, one confronts the colonial legacy present in the terms generally used to refer to them. I have avoided using words such as ‘Indians’, ‘Amerindians’, ‘aborigines’, ‘natives’, or ‘indigenous’ because of their colonial ring and pejorative connotations. They convey an image of non-European peoples as backward, weak, dependent and inferior.

Referring to the colonizers as Europeans, despite the fact that this denomination is somewhat anachronistic, I have decided to refer to the colonized as ‘Latin Americans’, ‘North Americans’, ‘American peoples’, ‘Australians’, ‘Australian peoples’, etc. In doing so, my aim is to place both colonizer and colonized in a conceptual plane of linguistic equality. I am aware that these terms are indeed idiosyncratic and even problematic in one way or another. But, perhaps, their novelty and strangeness can help break—if only shortly—the powerful association of non-European peoples with primitiveness and backwardness that pervades Western imagination and Western vocabulary.

The terms I have chosen have their own conundrums, and remain ultimately Eurocentric. Terms like ‘Latin Americans’ or ‘Australians’ are today used to refer to the inhabitants of Latin America and Australia, indeed mixed societies. Referring to the pre-colonial population that the Spanish encountered in America as Latin American is anachronistic, as the term Latin America started to be used only from the mid-nineteenth century. Most of these terms come also from continents that were named using European denominations. As is famously known, the name America was given in honor of a single individual: Amerigo Vespucci, an Italian explorer who first identified America as an autonomous landmass.

To differentiate between the colonizers and the colonized I have used the terms Europeans and non-Europeans, substituting the former for the more comprehensive Westerners once the U.S. started to colonize the territories west of the Appalachian Mountains. I have also resisted, as much as possible, use
of the expression Third World. Even though many scholars from Africa, Asia, and Latin America accept the term, to me "third" comes always after, and is always less, than "first" and "second". Once the term has lost the specificity that it acquired in the sixties, seventies, and eighties of the last century, and considering the powerful images of backwardness, social instability, despair, and violence also (unfortunately) associated with the term, I again prefer using alternative terms such as non-Western nations or, instead, naming the continents where the Third World countries are situated.

A final important point about the dichotomy First/Third World is that, as with all generalizations, it cannot completely account for the complexity of the reality it attempts to capture. One aspect of that complexity is the fact that there is a First World in the Third World and a Third World in the First. The former is composed of powerful and influential political and economic elites who have, since independence, generally aligned to Western and, nowadays, Chinese interests. The latter is formed by all those who live under the poverty line in the West, a part of which is comprised by destitute and marginalized immigrants and, most recently, by refugees from the Middle East escaping war.

Another vital term for the purpose of this study is nature. The definition of nature and the conceptualization of the relationship between humans and nature are far beyond the scope of the present work. The debate about the boundaries between the social and the natural is one of the aspects of this wide-ranging topic. This debate is manifested in recent discussions about the meaning of wilderness, another relevant term for this study. Importantly, when I use nature in this study, I am not referring to a romanticized idea of a pristine realm untouched by humans. Nature is continuously undergoing change, even without human intervention. Every living creature and life process leaves an imprint that somehow modifies the web of life of which we are part. Ice ages and the extinction of the dinosaurs prove that nature changes, even dramatically, without human intervention. This is why I have avoided using nature and wilderness as synonyms. So, when I use the latter word in the following chapters, I am just conveying the way in which the colonists perceived and characterized non-European ecosystems.

Nature also has myriad meanings. In this work, the term nature refers to the phenomena of the physical world taken together, excluding humans and human creation. In order to avoid repetition by using a term that appears on almost every page of this work, I have decided to use interchangeably words such as

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23 My six year old son will never want to be third. For him, the best is always the first and the second best is the second. This is an intuitive association that most of us consciously or unconsciously share.

24 Wilderness has been the focus of recent scholarly attention. See J. Baird Callicott and Michael P. Nelson and (eds.), *Great New Wilderness Debate* (Athens, University of Georgia Press, 1998) and Michael P. Nelson and J. Baird Callicott (eds.), *The Wilderness Debate Rages On: Continuing the Great New Wilderness Debate* (Athens, University of Georgia Press 2008).
nature, environment, the physical world, ecosystems, natural habitats, physical surroundings, non-human nature, etc. Many of these names have started to be used just recently. So, these words are anachronistic, in the sense that they were not part of the linguistic repertoire of the historical actors that are part of this study. It is thus important to bear in mind that I am not putting them in the mouths of the protagonists of this story, but that it is the author of this work who is using them.

V

This study is a historical narrative, and as such has its own biases and, certainly, limitations. The historical narrative that forms this study is the result of knitting together certain facts, ideas, and bibliographies, while at the same time excluding others. In choosing to analyze the works of Western intellectuals, the focus of this study remains Eurocentric. Moreover, I have revisited the canonical authors of the history of international law, those traditionally regarded as fathers of the discipline, such as Vitoria, Las Casas, Grotius, Pufendorf, Wolff, Vattel, Wheaton, Westlake, and Oppenheim, a list that most students of international legal history could recite by heart. I have also included other important intellectuals, who did not write specifically about law but whose role in theorizing Western colonialism and international affairs is now generally acknowledged: Acosta, Locke, Lafitau, James Mill, John Stuart Mill, and Lord Lugard. Although writing about them puts emphasis on Western intellectuals and their ideas, and on Western institutions and power, the purpose is to show their historical contingency rather than reify them.

A critical engagement with colonial history faces other challenges. Placing emphasis on the deleterious effect of Western power upon non-European populations runs the risk of unintendedly presenting the latter as mere victims, instead of agents of their own history. This tends to perpetuate an image of non-European peoples as weak historical actors while reinforcing the very power structures that critical thinking is committed to expose and contest. One way of avoiding this shortcoming is to underscore the

25 And hence it detracts attention from a wider history in which ‘indigenous’ and Mestizo intellectuals like Titu Cusi Yupanqui, Guaman Poma or the Alva Ixtlilxochitl brothers played a relevant role. In this sense see Titu Cusi Yupanqui, History of How the Spaniards Arrived in Peru, translated, with introduction, by Catherine Julien (Indianapolis, Hackett Publishing Company, 2006) and Gabriela Ramos and Yanna Yannakakis (eds.), Indigenous Intellectuals: Knowledge, Power, and Colonial Culture in Mexico and the Andes (Durham, Duke University Press, 2014). I am indebted to Arnulf Becker Lorca for having revealed to me the existence and importance of these non-European authors and the body of literature on them.
complexity, sophistication, and accomplishments of non-European societies, something that Chapter 1 attempts to do to a certain extent. Before Europeans could impose their rule over most of Africa, America, Asia, and Oceania, these continents housed rather refined societies, great urban areas, erudite centers of knowledge, powerful empires that displayed wealth and military prowess. Even at the height of Western imperialism, the emergence of powerful non-European empires such as the Comanche and the Zulu are testament to the capacity of non-European populations.

Another way of placing non-Europeans on the central stage of world history is to bring to light their resistance to Western imperialism. There is now a large body of scholarship focused on non-European strategies of resistance. In the light of these recent studies Western imperialism becomes a less one-sided process. Non-Europeans adopted a variety of ways to protect their societies and lifestyles from European encroachment. Accommodation, imitation, mediation, adaptation, and open resistance were used alternatively and even simultaneously by different societies. Importantly, resistance was not only a political, cultural, or military phenomenon. Western legal constructs were also used to resist the power of Western legal imperialism.

The result of acknowledging the power of pre-colonial societies, the fact that the West has only recently been materially superior to countries such as China (a fact that seems to be again changing), and non-European resistance is that it creates a much patchier historical picture, one that questions the necessity that is often associated with the phenomenon of Western imperialism. In this light, imperialism becomes a less robust and vigorous phenomenon and one more open to contestation. Showing that imperialism can be successfully fought and even, at times, defeated opens a space of possibility and encourages contemporary resistance against neo-colonialism and all forms of direct or indirect human oppression. This, of course, is not incompatible with acknowledging the traumatic effects of colonialism and neo-colonialism.


To end with, this study is approached with the humility of acknowledging that there is neither an easy way to access the past nor the minds of the protagonist of this story. All of them were complex individuals, acting in multifaceted historical scenarios, whose works are thus open to different interpretations. For this reason, it is worthwhile stating from the outset that the objective of examining their theories is not to pass judgment upon them, but rather to expose the limitations and harmful effects of the specific ideologies that structured the way they looked at the world. Perhaps when the lenses that framed their worldview are revealed we can perceive in our own lenses certain familiar elements that link to theirs. Hopefully this will allow us to start questioning the result of wearing various ideological lenses and even help us in taking them off as much as is possible.
Part I

LAYING THE GROUNDWORK: IMPERIALISM AND THE ENVIRONMENT

1 Western Imperialism, Non-European Ecosystems, and Environmental History (1492-1922)

Western imperialism has historically had an indelible impact on non-European ecosystems. By taking and trading plants and animal species from one continent to another, European colonization revolutionized the distribution of species around the world, homogenizing the biological composition of the Earth. It also transformed environmental relationships across time and space by building economic relations that fed on natural resources from European colonies. The environmental history of Western imperialism, encompassing more than four centuries and spreading geographically through several continents, is a complex one. For this reason, a detailed analysis is beyond the scope of the present chapter. However, in order to substantiate the thesis that international law has historically contributed to legitimizing the exploitation of non-European nature, it is important, at least, to offer an overview of the environmental impact of Western imperialism.

Whereas it is possible to establish a rather clear link between the economic ethos of imperialism and the legitimizing role of international law, it is more difficult to demonstrate that this legitimization, and the intra- and transcontinental economic relations that were webbed together as a result, led to widespread environmental degradation. This is so because for centuries the general impact of Western imperialism on non-European natural habitats was paradoxical to say the least. Against what would seem commonsensical, the aggregate effect of European world expansion was the blossoming of non-European

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ecosystems rather than their overall deterioration. One would think that as European colonists and their economic institutions and practices advanced in the colonies, nature shrank. But the truth is actually the contrary—nature expanded as European colonialism progressed.

The main reason for why environmental history betrays our presupposition is a simple one. As Westerners attempted to conquer the world, imperialism brought about a population collapse of immense proportions. Non-European populations in Latin America, North America, Oceania, and Africa disappeared by the millions. Most of them perished because of the effect that European germs had over a population weakened by the traumatic shock of the violence that accompanied Western inroads into their territories. Many other millions lost their lives while their bodies were being hunted and traded across the Atlantic Ocean as free labor.

A century after the arrival of the first colonists, the pre-colonial populations of Latin America, North America, and Australia were just a fraction of what they used to be. The slave trade deprived Africa of millions of men, affecting reproduction patterns, production systems, and social structures. All around the world great states collapsed and whole societies vanished forever. In many cases, the productive activities that were needed to sustain empires and feed millions slowly came to a halt. Because of depopulation, the pre-colonial impact of millions of people upon nature radically diminished once Europeans appeared on the scene. Survivors and newcomers kept tilling, trading, mining, and altering ecosystems, but their numbers were a fraction of the pre-colonial populations. As a result, non-European ecosystems had time to bounce back in myriad places that had been under intense human use for centuries.

The link between international law’s legitimization of an exploitative approach to non-European ecosystems and widespread environmental degradation is more elusive, then, than it would seem at first glance. In fact, the contrary is closer to the truth: by legitimizing Western imperialism, international law unintentionally contributed to the expansion of non-European natural frontiers for centuries. That said, international law cannot wash its hands of the current degradation that affects non-European natural habitats. This is so because, on the one hand, international legal theories helped in consolidating an economic approach to the colonies that from the very beginning paved the way for the localized destruction of non-European ecosystems. The natural resources of whole continents were subordinated to the needs of a few European nations. And there, where Westerners set their eyes on exploiting a particular natural niche, the destruction of nature followed unremittingly.
On the other hand, in time, the cumulative effect of the particular exploitative approach that international law helped consolidate ended up producing widespread ecological damage. That took place several centuries after Columbus landed in Hispaniola. By then, important transformations had taken place in all ambits of life. Population in the colonies had grown exponentially and, with the invention of new machines and tools, so had the transformative power of humans over nature. By the time of the Industrial Revolution, the environmental impact of Western imperialism had grown exponentially compared to Columbus time, but the exploitative approach to non-European ecosystems was present from the very beginning. From day one, colonists were extracting and exploiting natural habitats to their economic advantage. More importantly for this analysis, that exploitative approach informed the direction of international legal theories, which at the same time reinforced the ecological dynamics that came about as a result of Western imperialism.

The following pages are an attempt of giving a snapshot of different moments of that complex history. This chapter can be read in two different ways. On the one hand, one could read it from start to end to get an overview of the environmental history of Western imperialism, before proceeding to the parts of the manuscript dedicated to analyze the legal dimension of that story. At the same time, Parts 1, 2, 4 and 5 correspond to Parts II, III, IV and V of the present study. So, the reader could also familiarize with the environmental history of particular geographical locations and particular historical periods before immersing in the international legal historiography.

1. The Conquest of Latin America and Non-European Ecosystems

A broken myth: Latin American nature before Spanish conquest

The idea of paradise has for centuries captured the imagination of those who tried to describe Latin American nature before the arrival of Columbus. This image is a myth with old roots. Already at the moment of Spanish arrival to Latin America, Columbus himself was fascinated by what he saw as a pristine wilderness, beautiful, green, and fertile, full of birds and naked people.2 It is still possible to find in recent literature the persistent idea that Latin Americans lived in harmony with nature without altering it.3 Accordingly, if Latin Americans were nature’s protectors they could not have had an adverse impact

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on the ecosystems of the western hemisphere. The ‘ecological Indian’ and paradisiacal Latin America were two variants of the same ideological construction. In reality, and contrary to what this myth suggests, Latin American nature was thoroughly modified before the arrival of Spanish and other European colonists.

The same could be said about the territories of all the other continents that Europeans tried to bring under their control. The idea that pre-colonial non-European populations, by virtue of their very nature, had reached an absolute ecological balance is mere romanticization. Furthermore, it is very difficult to generalize, as pre-colonial societies varied enormously: whereas the environmental activities of some drove their own societies almost to the verge of extinction, others attained sustainability. The approach to ecosystems of large empires was not the same as that of smaller societies inhabiting the rainforest. But all them, to a greater or lesser degree, modified their surroundings and left traces of their activities. It would be impossible to provide a detailed account of the environmental impact of pre-colonial societies all over the world. Therefore, I have decided to focus mostly, but not exclusively, on Latin America. The environmental history of pre-colonial Latin America can help the reader imagine what was going on in other continents at the time.

For centuries, the environment of Latin America received the imprints of successive generations that inhabited the same lands. Each of these communities transformed their environment differently, but they all left an enduring mark. Population dynamics is one of the factors that explains the impact of Latin American peoples on their surroundings. In 1492 the continent was home to millions. Estimates today vary from 30 to 70 million, with some studies that suggest even larger figures. Mesoamerica, for

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4 The idea of the ‘ecological Indian’ has experienced a recent revival. The association of the peoples of Latin America and indigenous groups at large with the conservation of nature has been used as part of a counter-hegemonic discourse that blamed modernity and the West. Arguably, the myth of Latin America’s wilderness has also had the contrary political effect: it legitimised economic profitability and political domination by privileging the diffusion of the West into the vacuum of the non-West. See Andrew Sloyter, ‘Colonialism and Landscape in the Americas: Material/Conceptual Transformations and Continuing Consequences’ 91 Annals of the Association of American Geographers (2001) 410-428, 413


6 When I use the term pre-colonial I am referring to what predated the phenomenon of Western colonialism. There were so many empires and successive layers of colonization, not only in Latin America but around the world, that would make it hard to find populations that had never been conquered or forcibly mixed with others.

instance, was inhabited by a range of 8 to 25 million before the arrival of the Spaniards. Even the supposed wilderness of the Amazon Basin was home to as many as 5 million people.8

But mere population numbers are not enough to explain the environmental dynamics of pre-colonial Latin America. The economic activities of those peoples are as important as sheer numbers. The presence of vast empires in Latin America before the arrival of the Spaniards explains why nature was thoroughly utilized. In his palace of Nezahualcóyotl, the King of the Mexica Empire Moctezuma offered 1,000 meals a day to his family and acolytes.9 Among its many wonders, the palace included a zoo and 40 temples.10 Equally remarkable was the grand market of Tlatelolco, visited daily by sixty thousand people.11 According to Miller, in Tlatelolco visitors could buy myriad products such as ‘lumber, bricks, paint, tools, firewood, pottery, cookware, utensils, home furnishings, bedding, mattresses, jewelry … thread of many colors, cakes, and candies of honey and of chocolate. One could also sit down to a meal in an open-air restaurant or get a haircut’.12 The palace and the market were just some of the marvels that could be found in Tenochtitlan, the capital of the Mexica Empire and one of the biggest urban centers in the world at the time. Considering the amount of resources necessary to keep the Empire running, one can start to imagine the environmental impact of the various polities that dotted the continent.

The main productive activities in Latin America were farming, hunting, and gathering. In Mexico, Central Latin America, the Caribbean, the Andes, the Coastal Pacific, and portions of the Amazon basin, agriculture was widespread. The environmental impact of these practices was, in some areas, larger than in contemporary Europe.13 Extensive tracts of forests were cut in order to open space for cultivation. Clearing forests for agriculture was a very old process. In the lowlands of Mesoamerica, there is evidences of Olmec land alteration in the region surrounding the Laguna Pompal that goes back 4.830 years before our era.14 In addition to the demands of agriculture, Latin Americans expanded pockets of natural grasslands by using fire to clear forests in order to attract animals that could be easily hunted.15

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10 Ibid.
11 Ibid., 34.
12 Ibid.
13 Miller, An Environmental History, 12.
14 Michelle Goman and Roger Byrne, ‘A 5,000-Year Record of Agriculture and Tropical Forest Clearance in the Tuxtlas, Veracruz, Mexico’ 8 The Holocene (1998) 83-89.
Different cultures such as the Maya, Inca, pre-Inca groups, and the Amazonians practiced raised field agriculture.\textsuperscript{16} Hundreds of thousands of raised field platforms extended over the vast plains of the high Andean plateau in the northern Lake Titicaca basin.\textsuperscript{17} The sophistication of engineering techniques of water management that these fields evidenced is truly monumental.\textsuperscript{18} Of all the Latin American societies, it was the Mexica who developed the most advanced system of raised agriculture.\textsuperscript{19} The infrastructure that accompanied this type of agriculture included terraces, irrigation works, drainage ditches, causeways, canals, dams, reservoirs, and diversion walls, among others.\textsuperscript{20} Complex systems of canals in the northern coast of Peru and in the Salt River Valley in Arizona irrigated more land in ancient Latin America than is currently used for cultivation in those same regions.\textsuperscript{21} In the Valley of Mexico, careful composting and the addition of manure to the land improved raised agriculture, making the land extremely fertile.\textsuperscript{22} The productivity of these areas—enhanced by mild winters—was eight times superior to that of Europe during the same period.\textsuperscript{23} Moreover, whereas Chinese agriculture—one of the most advanced in the world at the time—supported fewer than 3 people per hectare in the fifteenth century, Mexica’s raised fields could support 15.\textsuperscript{24} These humanized landscapes that occupied thousands of hectares were anything but wilderness.

The Amazon provides another example of the kind of impact that Latin Americans had on their physical surroundings. There is increasing evidence that the tropical forests in the Amazon Basin, as elsewhere, are partly anthropogenic in form and composition.\textsuperscript{25} Even in the Amazon, the natural area that humans had more persistently associated with the idea of wilderness, it is now evident that different communities engaged in a variety of types of agroforestry, managing and manipulating the rainforests for food and other resources.\textsuperscript{26} They introduced several tree species that bore fruit in different seasons of the year. These practices enhanced the capacity of the forest to cover the demands of their diet. It has been claimed

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\textsuperscript{16} Miller, \textit{An Environmental History}, 19. For Mayan agricultural mechanisms (including raised agriculture) see Peter A. Furley et al., ‘Human Impact on the Wetlands of Belize, Central America’ in Robin A. Butlin and Neil Roberts (eds.), \textit{Ecological Relations in Historical Times} (Oxford, Blackwell, 1995) 280-307, 282-293. The authors maintain that Mayan agricultural systems remain unsurpassed even in actuality.


\textsuperscript{18} Ibid.

\textsuperscript{19} Miller, \textit{An Environmental History}, 19.

\textsuperscript{20} Denevan, ‘The Pristine Myth’, 375.

\textsuperscript{21} Ibid.

\textsuperscript{22} Miller, \textit{An Environmental History}, 21.

\textsuperscript{23} Ibid.

\textsuperscript{24} Ibid.

\textsuperscript{25} Denevan, ‘The Pristine Myth’, 373.

\textsuperscript{26} Ibid., 17.
\end{flushright}
that at least 11.8 percent of the non-flooded Amazon forest currently consists of species that have been
directly or indirectly introduced by humans. Researchers have also found that, together with the thin
mineral soils of the forest, there are deposits of deep, black, fertile earth called black soil or terra preta
(in its Portuguese denomination). This suggests that two thousand years ago the Amazonian population
intentionally increased the fertility of the land by recycling the nutrients of their culture back into the soil
through the deposit of ashes, rotting vegetation, animal remains, probably human stool, and charcoal. Scientists are now studying the composition of this terra preta with the aim of applying it to Africa in order to improve poor soils.

What is evident from all this data is that by 1492 the effect of Latin American peoples on the landscape
of the two continents was noticeable to say the least. They modified the vegetation and animal
composition of the continent. They altered the soil, improving it at times, but also causing erosion.

Anything resembling a paradise was an illusion. The inhabitants of Latin America adapted nature for
their benefit prior to the arrival of Columbus and, significantly, had done so for millennia. So was their
environmental impact positive or negative? Did they follow sustainable practices when using nature to satisfy their needs?

It is difficult to give a definitive answer to the question of sustainability, because the interaction with
the environment was as diverse as the Latin American peoples themselves. Their impact was sometimes
negative. For instance, there is evidence of soil erosion and human induced drought in Mesoamerica
before conquest. However, there is no agreement about the degree and significance of these phenomena
in comparison to the colonial use of those same lands. Some studies concluded that the level of erosion
in pre-colonial times is comparable with the later period of Spanish colonization, and that it was almost
catastrophic at times of dense population. Other studies contradict these findings, suggesting that
whereas severe erosion did occur and was associated with the settlement of small populations, it

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28 Miller, An Environmental History, 17.
29 Ibid.
30 Mann, Ancient Americans, 310.
32 Ibid.
33 Mann, Ancient Americans, 248.
decreased at times of higher population density after settlement. Accordingly, the latter studies conclude that the inhabitants of Mesoamerica adapted their practices in a sustainable way.

The worldviews of Latin American peoples and their understanding of the human-nature relationship were one of the factors that most strongly influenced the way Latin Americans interacted with the ecosystems of the continent. Again, the heterogeneity of Latin American societies gave rise to a variety of views regarding nature, its use, and humans' place vis-à-vis non-human nature. But even though there were important differences between non-sedentary, semi-sedentary, and sedentary peoples, and between groups within them, there were still general conceptions. For instance, most societies worshiped several gods and respected spirits related to nature. Aztec, Mayan, and Incan societies worshipped natural deities such as the sun, the moon, the rain, maize, mother-earth, etc. Despite reverence to natural elements, Latin Americans, not unlike Europeans, regarded nature mainly as a source of provision and consumption. The difference between the former and the latter is that Latin Americans did not draw a clear line between the human and natural realms; the natural and social life spheres were intermingled. Living things were imbued with spirit and, hence, they were not just natural matter that could be treated in any way one wished. They were also supernatural, which limited Latin American peoples’ willingness to destroy it en masse for consumption.

So, in comparison to Europeans, Latin Americans placed themselves on a more equal footing with plants, animals, and even inanimate objects. This does not mean that their conduct was exclusively guided by positives sentiments, of trust, respect, and fondness. In fact, their attitudes were ambivalent.

36 Ibid.
40 Miller, An Environmental History, 26.
41 Ibid., 27.
43 Miller, An Environmental History, 27.
44 Ibid.
While they venerated an array of natural creatures, at the same time they feared nature’s inner power.\textsuperscript{45} The Maya, for instance, had an almost paranoid terror of the forest.\textsuperscript{46} But in general, and for different reasons, most societies in the Americas approached nature with a deep sense of respect.\textsuperscript{47} Nearly all of them made apologies when they hunted or cut trees in order to prevent the spirits from taking vengeance on those who harmed them.\textsuperscript{48} But Latin Americans' worldviews were complex and did not always amount to a respectful use of ecosystems or caring treatment of natural elements. In certain cases, religious practices fostered the destruction of nature. It was common, for example, to carry out rituals where animals were sacrificed to appease the gods.\textsuperscript{49}

Sacredness permeated every aspect of material life.\textsuperscript{50} Religious and economic practices were not compartmentalized; on the contrary, they interpenetrated one another. Consequently, activities such as agriculture or hunting were partly considered sacred.\textsuperscript{51} Again, this does not mean that Latin Americans’ spirituality led necessarily to sound ecological practices. In fact, there are current examples of Latin American societies who descend from pre-colonial populations that engage in un-ecological behavior, in contravention of religious doctrines, which suggest that the same may have happened in the past.\textsuperscript{52}

Besides religion, attachment to a particular location set limits on the human use of ecosystems. In general, geographical attachments tended toward sustainability.\textsuperscript{53} The preservation of landscapes was often vital in order to preserve the group’s collective memory, as particular sites were linked to the cultural and spiritual achievements of a given society.\textsuperscript{54} Geographical attachment stemmed also from practical considerations. In the densely populated Middle and South Eastern parts of Latin America, venturing outside the limits of one's group risked invading another's territory and provoking

\textsuperscript{45} Ibid.

\textsuperscript{46} Ibid.


\textsuperscript{48} Ibid.


\textsuperscript{52} These examples can be found in Arne Kalland, ‘Indigenous Knowledge: Prospects and Limitations’ in Roy Ellen et al. (eds.), \textit{Indigenous Environmental Knowledge and Its Transformations: Critical Anthropological Perspectives} (Amsterdam, Harwood Academic Publishers, 2000) 319-335, 322-324.

\textsuperscript{53} Miller, \textit{An Environmental History}, 43.

\textsuperscript{54} Ibid. The connection between spirituality and landscapes within Americas' cosmology is further explored in Vine Deloria Jr., \textit{God is Red: A Native View of Religion} (Colorado, Fulcrum Publishing, 1992) 267-282.
confrontation, sometimes with fatal effects. So safeguarding the fertility of the land was a powerful driver of behavior. Latin Americans had learned empirically how far they could push nature's carrying capacity in a given area. In cases of weak military power, preserving the soil fertility was essential.

Following Miller, we can conclude that:

Some cultures obviously crashed and their failure to achieve sustainable lifestyles may have played a role. For the most part, however, Indians expected the future to be very much like their present and generally farmed in one year with an eye focused carefully on the next. By the fifteenth century, most Indians, like most Europeans, had settled into sustainable patterns of producing food.55

Every activity that the peoples of Latin America undertook left an imprint on the natural habitats of Latin America. Their relationship with the natural world was complex. In general, they believed in a continuum between the natural and social realms, which prevented a total domination of the former by the latter. Religious as well as practical considerations fostered connectedness with nature, but were, at times, overridden by competing factors such as consumption or population pressures, especially within large empires who could reap the benefits of controlling much territory and using the natural resources of larger geographical areas. This notwithstanding, and in spite of alleged failures,56 Latin Americans generally modified their landscapes in stable, supple, resilient ways.57 Far from perfect equilibrium, their lifestyles, even in the biggest empires, did not produce an overwhelming or irreversible damage to nature. A line, even if more nuanced than has been generally recognized, can still be drawn between their practices and those introduced by European colonizers. The idea of nature as an objectified reservoir of natural resources for personal benefit and its separation and subordination to the social realm were alien to the Latin Americans’ worldview.

55 Miller, An Environmental History, 41.
56 The collapse of the Mayan Empire has been linked to an overuse of natural resources. See Jared Diamond, Collapse: How Societies Choose to Fail or Succeed (New York, Viking, 2004) 157-177 and Ronald Wright, A Short History of Progress (Toronto, Aransi, 2005) 95-106. For a corrective to this view see Mann, Ancient Americans, 247-279.
57 Ibid., 248. See also Harkin and Lewis, Native Americans, xx. On the question of sustainability, see also Miller, An Environmental History, 40-48.
The environmental impact of Spanish colonialism in Latin America

Columbus’ voyages to Latin America took place during the era of discoveries characterized by the emerging Portuguese and Spanish imperial powers, their maritime hegemony and their capacity to annex vast territories overseas. In a broader historical perspective, these voyages were part of a period of cross-cultural interaction of unparalleled dimensions. The search for trading routes and the colonization of new lands gave rise to three interrelated phenomena: the creation of a global system of communication through the seas; the global exchange of biological species with profound implications for humans and nature; and the intensification of intercontinental trade, which affected previous patterns of production, consumption, supply, and social organization worldwide.

In the new milieu of imperial expansion, Latin America’s natural resources were of outmost importance. Latin American and African labor extracted gold and silver at a high human cost. These precious metals gave European merchants the resources they needed to trade in Asian markets, fostering Asian economies as a result. As Latin American riches were being drained, their monetary value went to the hands of the newcomers, their Latin American allies and economic elites located in distant centers of power. At the same time, the colonists’ demand for certain European commodities that could not be found in Latin America increased European exports. New needs on both sides of the Atlantic fostered the development of a transatlantic trade controlled by an influential European commercial class.

The geographical expansion and intensification of trade had important environmental consequences. Spaniards were far more plunderous than Latin Americans when they decided to exploit a specific natural resource. The search for elements of the environment that could be turned into tradable commodities was a colonists’ obsession.

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59 Ibid., 22.
63 MacLeod affirms that ‘the economic history of Central America in the two centuries following Spanish conquest can be described as a constant search for a single key to wealth … which would provide tangible wealth for large numbers of individuals of the invading groups’. See Murdo J. MacLeod, Spanish Central America: A Socioeconomic History 1520-1720 (Austin, University of Texas Press, 2008) 47. Castilian economic stagnation together with the possibilities of fast fortune in Latin America pushed thousands overseas. Carole Shammas, ‘The Origins of the Transatlantic Colonization’ in Daniel Vickers (ed.), A Companion to Colonial America, (Oxford, Blackwell Publishing, 2003) 25-43, 33. See also, Angus Mackay, Spain in the Middles Ages: From Frontier towards Empire 1350-1500 (Hong Kong, McMillan, 1977) 173.
namely silver and sugar, overran the value of any other product. The impact of their extraction and production on Latin American ecosystems was deep and lasting.

Whereas the Latin American peoples worshipped nature, colonizers worshipped their god and venerated gold and silver. It is said that ‘once Columbus landed in the New World … he praised God and enquired urgently after gold’. The mining industry was one of the main engines of social and ecological transformation in colonial Latin America. Mines entailed the establishment of complex settlements and large populations, which attracted other economic activities and stimulated at the same time the growth of colonial agriculture and pastoralism. Trees were cut for timber to build wooden props that would support tunnels in the mines. In addition, the land was deforested in order to make room for cattle and cultivation. This produced severe localized impacts. In the mining town of Potosí in the Viceroyalty of Peru, not a single tree grew around the city at the end of the sixteenth century. The tentacles of the mines in what is today Bolivia reached as far as Chile, Paraguay, and Argentina, which were inserted in a provisioning network staggering in its size and complexity. Caribbean islands also lost a sizable part of their forest cover to provide wood for the construction of the ships that carried silver to Spain.

In addition to deforestation, the most adverse impact of mines on humans was neither the consequence of axes nor burning, but rather mercury. It is quite likely that mercury pollution from silver mines in Mexico and Peru was the largest source of industrial pollution in the early modern era (1500-1800). As mercury accumulated in plants and animal tissue, its effects spread far from the initial source, creating long-lasting circles of toxicity. Unlike deforestation, the impact of mercury surpassed the continental

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64 Other products were equally intensively exploited, although not as extensively. For instance, 2 million Brazilwood trees were shipped from Brazil to Portugal and France during the Sixteenth Century. See John F. Richards, The Unending Frontier: An Environmental History of the Early Modern World (Berkeley, University of California Press, 2003) 383.
65 Mackay, Spain in the Middles Ages, 173.
66 Richards, The Unending Frontier, 368.
67 Potosí with 160,000 inhabitants was by far the largest city in Spanish South America. It was also the main producer of silver. Hanke considers Potosí’s history as the most interesting and important among the primary urban centers of Spanish America. See Lewis Hanke, The Imperial City of Potosí: An Unwritten Chapter in the History of Spanish America (The Hague, Nijhoff, 1956) 1. But the history of the city also has a dark side. According to Galeano, eight million people perished in the three centuries following the beginning of operations at its silver mine of Cerro Rico. See Eduardo Galeano, Open Veins of Latin America: Five Centuries of the Pillage of a Continent (New York/London, Monthly Review Press, 1973) 50.
69 Ibid.
71 Richards, The Unending Frontier, 369.
reach. Nriagu claims that ‘it would seem likely that the Latin American silver mines were partly responsible for the high background concentration of mercury now being reported in the global environment’. 73

Sugar plantations reduced soil fertility and caused deforestation, producing a harmful effect on the environment. 74 Before sugarcane could be planted, large portions of land had to be cleared. Therefore, sugar plantations became a rival to other uses of the land, including woodland. Furthermore, as the processing of sugar required large quantities of fuel, producers cleared forests that would have otherwise remained intact. 75 The environmental consequences of sugar plantations were severe in the smaller Caribbean islands. 76 In the coastal area of Brazil, the victim of sugar plantations and other activities associated with settlement was the 1.3 million square kilometers Atlantic forest, one of the most diverse and delicate eco-systems on Earth, home to more than 60 percent of all terrestrial living species. 77

Paradoxically, in spite of the clear ecological costs of mining and plantation agriculture, the Spanish and Portuguese conquest triggered a process of environmental recovery. The lethal impact of colonization on the pre-colonial Latin American population reduced the human pressure on the regions’ landscapes. 78 With tens of millions fewer human beings utilizing natural habitats, the pressure on ecosystems reduced drastically. As a result, soils, forests, water, and wild life, which had been under intensive use by the peoples of Latin America for millennia, were suddenly given some centuries to regenerate. 79 The Amazon offers an example of the contrast between the colonists’ greedy attitude toward nature and their more destructive practices, and the larger picture of environmental regeneration that was indirectly caused by colonization:

The impact on the landscape was paradoxical. While the extractivist explosion was causing serious damage to ecosystems in the floodplain and uplands, depopulation was allowing forest to recolonize areas where it had been

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74 The production and trade of sugar propelled both the colonial economies of the Caribbean islands and the cost of the Brazilian and African slave trade. Sugar trade was very profitable. Merchants could get at destination twice to four times the purchasing price at Brazilian ports. See Stuart B. Schwartz, Sugar Plantations in the Formation of Brazilian Society: Bahia, 1550-1835 (New York, Cambridge University Press, 1985) 3, and Richards, The Unending Frontier, 388.
75 Ibid., 413.
79 Miller, Environmental History, 56.
cut back in the late prehistoric period, especially the upland savannas and the flood plain. These were precisely the areas that would be visited and used as collection sites by nineteenth-century natural scientists and misconstrued as virgin and primeval. Meanwhile, Europeans were introducing new forms of land use with increasing impacts: new forms of plantation agriculture, notably cacao, sugar, and coffee, as well as cattle ranching.80

Apart from the population collapse of Latin America, there were three other factors that helped the preservation of nature.

First, Europeans took centuries to control the whole continent, finding groups that successfully resisted their advance in the vast territories of Patagonia, Northern Mexico, the North Latin American West, and parts of the Amazon, among others.81 These were vast areas that contained rich ecosystems, many of which had not been subjected to the same population and consumption pressures as the lands of the Anahuac82 and Tawantinsuyu83 empires. In these extensive territories, the environment was less exploited than anywhere else in the Hemisphere.

Second, the impact of the colonists on the environment was not merely negative. The Spanish practiced conservation in specific locations. The long-distance transhumance and land conservation techniques in sheep rising implemented in New Mexico are a good example. They contributed to the softening of the environmental burden of settling in Latin America.84 The governments of the Iberian Peninsula also sought to preserve their empire’s natural resources. Spanish legislation in the viceroyalty of New Spain protected Latin American agricultural production from the damage caused by the livestock of Spanish herdners.85 Similarly, the Crown of Portugal showed determination to preserve the Brazilian Mangrove forests.86

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81 Miller, Environmental History, 92.
82 This is the Nahuatl name that the Mexica gave to the Valley of Mexico, the territory of the Nahua Triple Alliance formed by the union of the three city states of Tenochtitlan, Texcoco, and Tlacopan, a pre-colonial Empire that is today called Aztec Empire after this expression was coined and popularize by Alexander Von Humboldt and William H. Prescott respectively.
83 Tawantinsuyu or ‘The Four United Provinces’ was the Quechua word for what the Spanish referred to as Inca Empire.
86 The resilience of the trees played also an important role in their preservation. See Shawn W. Miller, ‘Stilt-Root Subsistence: Colonial Mangroves and Brazil’s Landless Poor’ 83 Hispanic American Historical Review (2003) 223-253.
These measures of conservation did not stem from a caring attitude toward nature, but rather from a reaction to the destructiveness of the conquerors. Although Crown and conquistadores shared the objective of exploiting Latin America’s natural resources, their perspective was somewhat different. The conquerors’ short-term interests clashed with the Crown’s long-term goal of assuring the economic viability of the colonies.\(^{87}\) So the effectiveness of regulations varied depending on profitability. When the exploitation of a particular natural resource did not offer much in return, legislation was often implemented. In contrast, if the returns derived from the exploitation of particular natural elements were high, the law was easily circumvented.\(^{88}\)

Finally, the strong monopolies that the Spanish and Portuguese Crowns established over colonial commerce reduced the magnitude of the colonists’ environmental impact.\(^{89}\) The biggest threat to the system was contraband, which flourished mainly in the Caribbean islands, helping England, France, and the Netherlands get their hands on the transatlantic commercial exchange. This notwithstanding, the vigor and even harshness with which the Iberian Peninsula enforced its monopoly for three centuries prevented colonial trade from running at full speed.\(^{90}\)

Despite these positive dynamics, colonization in general contributed to environmental degradation. Why then did the Iberians undertake such short-term, devastating activities in the colonies? What were the reasons for their unsustainable behavior?

As previously mentioned, the chief reason was the fervent pursuit of profits. But greed did not operate alone. There were other reasons for their destructiveness. In many cases colonists found landscapes that would have seemed rather fertile for a common European observer but hid vulnerable soils.\(^{91}\) So, unwittingly, they introduced unsound economic activities that depleted the soils and caused erosion. In addition, Latin America was so vast and depopulated that nature’s capability to absorb human impact might have seemed unlimited. Colonists naturally assumed that if environmental degradation rendered a specific economic activity unprofitable there was always the possibility of moving to new unexploited

\(^{87}\) For a similar opinion see Dore, ‘Environment and Society’, 6.

\(^{88}\) Concrete examples are provided in Miller, ‘Stilt-Root Subsistence’, 251-252 and Dore, ‘Environment and Society’, 6.

\(^{89}\) Miller, *Environmental History*, 93. Trade was only profitable when the metropolis managed to exercise an exclusive right to channel the commodities from Latin American to metropolitan ports, enriching both the state through taxes on trade and the nation’s merchants by eliminating foreign competition. The absence of a strong mercantile class in Spain enabled foreign merchants, especially Genovese, to control parts of the Latin American trade. Nevertheless, most of the trade with Latin America was channelled through Seville and monopolized by royally approved merchants of various nationalities. See Mackay, *Spain in the Middles Ages*, 170 and Richards, *The Unending Frontier*, 311.

\(^{90}\) Miller, *Environmental History*, 93-94.


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lands. In Latin America, colonial economic activities seemed like islands in what looked like a sea of wilderness. Finally, few colonists settled permanently in Latin America. Their goal was to travel, get rich as swiftly as possible, and return to civilized Europe to enjoy a good retirement and the status that came with wealth. Consequently, Europeans tended to treat Latin American landscapes with less care than those at home.

As we have seen, the change from regional to global trade within centuries was the chief reason for the intensification of the assault on nature that resulted from Spanish and Portuguese colonialism. The existence of a transatlantic trade and a global demand animated the exploitation of landscapes that could produce precisely those needed marketable commodities. But it is worth noting that the difference between the Spanish and Portuguese, on the one hand, and the people from Tawantinsuyu and Anahuac, on the other, was the scope of the trade and the number of people involved in it (as producers and consumers), and not their acquisitiveness, which was a common trait of all these empires.

The consideration of colonization as a positive or negative environmental process depends on two factors. The first is the time frame considered. Nature recovered during the first three centuries of colonization. In contrast, during the following centuries the use of natural resources intensified, causing widespread ecological degradation. By then, important demographic, economic, and social changes like population growth, the expansion of markets, and especially industrialization and urbanization were underway. However, these processes were based on previous economic and ideological patterns of behavior introduced at the time of conquest that proved environmentally unsustainable. That is to say, the colonists’ approach to Latin America, characterized by the intensive commercial use of natural resources, remained unaltered or rather intensified during the centuries following the arrival of the first colonizers. The second factor to take into account is the explanation of the recovery of some of Latin American natural habitats at the time of European penetration. This positive outcome was to a very limited extent attributable to the sound practices introduced by the colonists, the main factor being (as previously mentioned) the depopulation of the continent. Considered as a whole, however, the environmental ‘balance sheet’ of colonization was quite negative. Moreover, in particular locations, the scale of environmental change they introduced and the damage that resulted from it was unprecedented.

92 MacLeod, *Spanish Central America*, 48.
93 Ibid., 81.
94 Ibid.
95 Ibid.
2. Environmental Impact of European Imperialism (1600-1800)

North America

Nature was profoundly reshaped during the colonial period. Between 1600 and 1800 the territorial sway and capacity of Europeans nations for transforming the environment expanded considerably. Parallel to this development, the number of economic actors engaged in intercontinental exchanges of commodities grew rapidly. But even in places where European imperial powers could not impose their will, like China and Japan, nature also experienced the increasing pressure of human economic activities. In fact, one of the most significant and profound environmental trends of the Early Modern Era, the natural or forced settlement of previous nomadic groups in order to practice settled agriculture or what had been called by Bayly ‘the great domestication’, took place in places as diverse as the Indonesian islands, Scandinavia, Russia, or Brazil.96 Population growth and the consolidation of larger centralized states, able to guarantee a certain degree of security, encouraged pioneer settlers to occupy uncultivated land in vast natural world frontiers.97

All around the world, settlers affirmed their presence and power in territories which had been previously inhabited and used by shifting cultivators, hunter-gatherers, and pastoralists. In different locations the new settlers violently clashed with earlier populations. So, the process of environmental transformation of vacant lands was coupled with a process of social reconfiguration marked by the displacement of earlier groups to the margins of newly born landed empires. North America was one of the largest natural frontiers opened up by European colonization during the seventeenth and eighteenth centuries. The pattern of environmental alteration in this region of the globe is a good example of what took place in other colonial territories at the time. North America is also relevant because of its role in the legal and political arguments of Grotius, Locke, Vattel, and Wolff.

Before the arrival of Europeans, North America was a mosaic of societies, languages, and religions.98 As with their Southern counterparts, the peoples that inhabited the Northern part of the American continent ‘developed sophisticated cultures, created and lost empires, produced stunning works of art, engaged in sophisticated agriculture, and had a rich history of their own before Columbus ever set foot

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97 Ibid.
in the continent. North American societies were in constant flux, partly as a result of intensive social, political, and economic interactions between one another. Trade, one of the activities that most intensely stimulated contact between different groups, had already started ten thousand years before the arrival of the first colonists.

As in the Southern part of the Western Hemisphere, social change and social interaction left a noticeable mark on the environment. North America was far from being the unspoiled wilderness that the first colonists depicted. The wild character of North American ecosystems was associated with the nature of its population. The old derogatory image of North American peoples as an extension of their wild environment has its antithesis in their contemporary characterization as living in perfect harmony with nature. Both are myths that have more to do with past and present European stereotypes than reality. For millennia the numerous societies of North America thoroughly and extensively modified their environment. They built extensive networks of roads, trails, and causeways, introduced irrigation systems, terraced fields, and founded cities like Cahokia, which in its apogee could have housed as many as 20,000 people, not an insignificant number at the time. North Americans had an impact on the land, water, fauna, flora, and all the other elements that constituted the basis of their material life. Hunting, fishing, agriculture, and the widespread use of fire were the main human activities that contributed to environmental alteration.

An intensive use of natural resources placed some of the societies of North America near the limits of what was ecologically viable. For example, the exploitation of soils and surrounding forests, together with climatic factors, drove Cahokia to an ecological crisis of unprecedented dimensions, which its social and political institutions could not prevent. By the end of the fourteenth century the inhabitants of the

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104 Adam M. Sowards, United States: An Environmental History (Santa Barbara, ABC-CLIO, 2007) 20.
city had fled, regrouping in small farming villages in the countryside around their former settlement.\textsuperscript{106} Excessive hunting may have also contributed to the extinction of certain animal species.\textsuperscript{107}

Despite the undeniable impact of North American peoples, the environment that the first European settlers found remained abundant and fertile. Sustainability was the result of the combined influence of two main factors. First, European germs decimated North Americans. Of all infectious diseases, smallpox was the most severe. It travelled faster than the colonists, making major inroads on several North American societies in the seventeenth century even before the Europeans appeared on the horizon. The result was a population collapse of unprecedented dimension. Of the several millions of North Americans that inhabited the continent before conquest, only one million survived at the end of the eighteenth century.\textsuperscript{108} With considerably less people to compete for natural resources, the human pressure on the environment decreased, and animals, vegetation, and land had precious time to recover from intensive use.\textsuperscript{109}

The second reason for natural abundance in North America had to do with North Americans’ way of living. Despite concrete failures they had generally established sustainable patterns of environmental alteration.\textsuperscript{110} The fact that nature bounced back from intensive use when the original population diminished has been considered clear evidence of the fact that, in spite of environmental degradation, nature’s capacity for regeneration was never lost.\textsuperscript{111}

The arrival of the Dutch, English, and French transformed the pattern of natural alteration. The establishment of colonies entailed a profound reconfiguration of North American nature. Plantation agriculture was one of the activities that had a more lasting and adverse impact on the environment.\textsuperscript{112}

\textsuperscript{106} Ibid.
\textsuperscript{107} Lewis, ‘American Indian’, 199.
\textsuperscript{109} The same environmental dynamic affected South America at the onset of colonization. See page 23.
\textsuperscript{110} For the northern part of North America and the Pacific West see Graeme Wynn, \textit{Canada and Arctic North America: An Environmental History} (Santa Barbara, ABC-CLIO, 2007) 377 and Sowards, \textit{United States}, 47. Importantly, Sowards also affirms that hunting was an exception to the general sustainability of Americans in the West Coast, as they drove certain species to the verge of extinction. One of the mechanisms that allowed the regeneration of nature was North Americans’ pattern of migration and resettlement, which helped recovering exhausted soils. These processes are described in Michael Williams, \textit{Americans and Their Forests: A Historical Geography} (Cambridge, Cambridge University Press, 1989) 38-40. One of the main factors for North Americans’ sustainability was low population densities. See Lewis, ‘American Indian Environmental Relations’, 199.
\textsuperscript{112} For the environmental impact of agricultural commodities such as tobacco, indigo, rice, or cotton see Matthew Dennis, ‘Cultures of Nature: to ca. 1810’ in Sackman, \textit{A Companion}, 214-245, 225-219.
To take one example, the cultivation of tobacco in Virginia had contributed by the mid seventeenth century to the deforestation of half a million acres of land.113 The loss of forest cover caused floods, siltation, and erosion.114 Similarly, cotton plantations in the South provoked soil erosion, which became evident by the end of the eighteenth century.115 As in Latin America, the widespread availability of forests and fertile soil discouraged settlers from adopting protective measures of land use.116 When the soil became depleted it was relatively easy to resettle, pushing the natural frontier further into the interior of the continent.

Besides agricultural toil, hunting contributed to environmental deterioration, impairing wild life and threatening the survival of particular animal species. The economic value of beaver furs for the English and French hat industries fostered commercial interests in hunting.117 North America’s original inhabitants did most of the hunting. The Iroquois, for instance, negotiated with English traders, particularly the Hudson’s Bay Company, which had acquired the preponderant commercial position in the northern colonies.118 The mid-eighteenth century trade in furs resulted in the killing of two million beavers.

The participation of North Americans in these killings and their role in the nearly extinction of the bison119 attests to the complexity of their environmental behavior.120 One explanation of their paradoxical destructive attitude toward their own environment and source of provision points to the weakening of former hunting taboos because of colonization. According to Martin Calvin, once the Micmac of the North were convinced that their former religious beliefs no longer protected them from diseases and warfare, which sharply increased after the arrival of the colonists, they abandoned their old religious practices, including taboos that prevented excessive hunting.121 A more likely explanation of North Americans’ participation in the fur trade emphasizes their increasing dependency on markets

113 See Donald E. Davis, Southern United States: An Environmental History (Santa Barbara, ABC-CLIO, 2006) 101.
114 Ibid. See also Williams, Americans, 57.
115 Davis, Southern United States, 125.
117 See Petulla, American Environmental History, 26. According to Petulla, ‘In 1638, King Charles I decreed that all hats manufactured in England had to be made of beaver fur’. Ibid.
118 Ibid., 26-27.
120 An interesting discussion about the complexity of North American environmental attitudes can be found in Harkin and Lewis, Native Americans.
overwhelmingly controlled by the Europeans, to which they were driven by the scarcity of the natural resources that had traditionally sustained them, creating the need for an alternative source of provision.  

Of all the environmental changes that resulted from the establishment of European settlements in North America, the destruction of forests was the most notorious. Forests were at the heart of the settler economy. The felling of trees provided space for cultivation as well as fuel, timber, and building materials, among other commodities. The first settlers left trees almost untouched, as they found abundant vacant land to settle and cultivate. However, the beginning of the eighteenth century marked a change of that pattern. As the colonies prospered, the intensive use of forests accelerated even further during the second half of the century. The institution of private property, the requirements of the market, the dispersion of settlements and the association of the alteration of nature with the idea of progress reinforced the economic satisfaction of the needs of the settlers.

Nevertheless, despite the increasing pressure of the colonial economy on North American ecosystems, colonists’ numbers and simple tools limited their general impact. It was not until the independence of the U.S. and its process of industrialization and expansion to the West that the North American environment faced large-scale degradation.

Sugar Islands

The legitimation of global trade and its increase during the Early Modern Era had a deleterious effect on nature. Trade imperialism helped the emergence of the Dutch and British Empires. Under the control of only a few nations, the appetite for all kinds of goods in European markets drove intercontinental exchanges of commodified natural elements that often resulted in the exploitation of natural habitats in colonial territories. The Caribbean islands are a good example of the kind of environmental pressure elicited by intercontinental trade. In fact, at the time, they were like miniature laboratories where the environmental effects of global trade could be observed and measured. Once the Europeans got used to sweetening their palate with sugarcane, their craving for sugar became one of the main engines of the

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123 As we have already mentioned, this abundance was a consequence of the high death toll among North Americans from the germs the European brought onto the continent.


125 Williams, *Deforesting the Earth*, 197.
Atlantic economy, thoroughly transforming Caribbean landscapes. Sugar plantations also stimulated the Atlantic slave trade, a large and profitable scheme of human suffering.

Sugar cane was the main commodity produced in Caribbean islands. The British deforested and established sugar plantations in the Lesser Antilles, including Antigua, Anguilla, Barbuda, Montserrat, and Barbados, which was relatively bigger than the other islands. After the Treaty of Paris in 1763, they also acquired from the French the islands of Saint Vincent, Dominica, Grenada, and Tobago. The British soon turned the production of indigo, coffee, cotton, cocoa, and food for consumption in these islands into sugar plantations. Sugar fields were also prevalent in Jamaica at the end of the seventeenth century. The French copied the intensive system of sugar production that the English had introduced to Barbados and applied it in Martinique, Guadeloupe, and Saint-Dominique (today Haiti).

By the end of the eighteenth century, the Caribbean islands produced an aggregate amount of 180,000 metric tons of sugar for European markets. In the second decade of the nineteenth century, the figure rose to 265,000. Production increased despite Haiti’s independence, which detracted 60,000 metric tons from the total amount of the trade. Because sugar was a scarce commodity, its traffic became extremely profitable. Although producers and merchants benefited, cane growing took a hefty human and environmental toll. When Caribbean islands were first occupied, the pre-colonial Taíno population was almost entirely obliterated. Those who survived served as labor force in the plantations, perishing thereafter. Eventually, they were substituted by indentured European settlers, and later by less expensive African slaves.

The effect of sugar production on the environment of Caribbean islands was particularly noticeable due to their reduced territorial extension. But sugar extended also to the Brazilian coast, where plantations mushroomed in the great Atlantic forest. The Antilles’ unique ecosystems were more vulnerable to large human-induced changes than the extensive frontiers of Brazil or North America, where plantations and the market economy took much longer to produce widespread environmental damage.

126 Richards, *The Unending Frontier*, 426.
127 Ibid.
128 Ibid., 454-455.
129 Higman adds many other changes to what he calls the ‘sugar revolution’, namely: ‘a shift from diversify agriculture to monoculture, from small to large scale farming units, from low to high value output, from sparse to dense settlement patterns, and from free labor to slavery … a massive increase in the Atlantic trade in goods and enslaved people, new patterns of nutrition, enlarged European interests in tropical colonies, and the provision of capital vital to the industrial revolution’. See B. W. Higman, *A Concise History of the Caribbean* (Cambridge, Cambridge University Press, 2011) 98-99.
130 For the impact of plantations and the market economy, see discussion in section 2. See also Merchant, *The Columbian Guide*. For the environmental impact of sugar plantations on the Brazilian Atlantic forest see Warren Dean, *With Broadax and Firebrand: The Destruction of the Brazilian Atlantic Forest* (Berkeley and Los Angeles: University of California Press,
The main environmental alterations to the Caribbean landscapes were caused by the substitution of the tropical rainforest by less varied fields of sugar cane.\textsuperscript{131} In addition, the boiling of the sugar cane syrup, in order to get the crystals that we are used to consuming, demanded even more wood to produce the heat required. Due to the environmental pressures of sugar cane plantations, in a few decades, by around the mid-seventeenth century, the once exuberant tropical forests of the Caribbean islands were almost totally gone.\textsuperscript{132}

Due to the undeniable environmental impact of colonial trade in Caribbean islands, most planters, especially in the British islands, introduced certain measures of conservation when they realized that yields were diminishing due to soil exhaustion. For instance, they kept patches of forested land within their plantations and adopted innovative techniques of land management.\textsuperscript{133} However, their efforts were not enough to restore the sustainability of the islands’ economy. Ultimately, the Caribbean islands could only keep up their level of production by extending even further the frontier of cultivated land, and importing all the essentials (timber, fertilizers, and provisions) that were necessary for the production of the plantations and in general for the continuation of life on the islands.\textsuperscript{134}

The destruction of the forest had several environmental effects. It damaged the biodiversity of the islands as it reduced habitats, driving several animal and tree species to extinction or the verge of extinction.\textsuperscript{135} In addition, the reduction of vegetation and the intensive use of land produced soil exhaustion and erosion.\textsuperscript{136} In smaller islands like Barbados, the almost total disappearance of the forest caused a considerable reduction of rainfall and even the warming of its climate.\textsuperscript{137} Tropical forests were resilient and, sometimes, they reclaimed land in abandoned sugar plantations and states. However, in many cases nature was so degraded that forests could never bounce back and revert to its pre-colonial condition.\textsuperscript{138}

\textsuperscript{1995}. Dean affirms that mining for gold and diamonds in the Atlantic forest of colonial Brazil was far more destructive than sugar plantations, Ibid., 99.
\textsuperscript{131} Ibid., 105-106.
\textsuperscript{132} Williams, \textit{Deforesting the Earth}, 201-202.
\textsuperscript{133} Richards, \textit{The Unending Frontier}, 421-424.
\textsuperscript{134} Ibid.
\textsuperscript{135} Richards, \textit{The Unending Frontier}, 458.
\textsuperscript{136} Ibid., 460. See also Williams, \textit{Deforesting the Earth}, 201-202.
\textsuperscript{137} Richards, \textit{The Unending Frontier}, 420-422.
\textsuperscript{138} Williams, \textit{Deforesting the Earth}, 203.
3. A Changed Scenario: The Industrial Revolution

In 1750, most people lived in what have been called ‘agrarian empires’, and their main occupation was to till the land. This was in part the result of the ‘great domestication’. This name designates a process of settlement and sedentarization that transformed nomadic frontiers into sites of permanent cultivation. In addition to this environmental transformation, a growing number of households in northwestern Europe began to relocate their productive resources between 1650 and 1850 ‘in ways that increased both the supply of market-oriented, money-earning activities and the demand for goods offered in the marketplace’. The new desire to acquire ceramics, paintings, prints, maps, books, furniture, silver, glass, and textiles, and the industrious effort undertaken in order to accumulate the capital needed to purchase them, have been referred to as the ‘industrious revolution’.

The great domestacions and the industrious revolution amplified the environmental impact that humans had on the ecology of the Earth. Built on these former processes came the major economic, social, and environmental changes of the long nineteenth century. The agrarian and industrial revolutions that started around 1750 and continued during the following centuries—slowly at first, then swiftly—altering the face of the Earth from the mid-nineteenth century. They generated growth processes that interacted in complex ways and gave rise to even more growth, generating an everlasting spiral of economic expansion that resulted in the overexploitation of natural habitats worldwide.

The agricultural revolution started in Britain during the second half of the eighteenth century due to several interrelated factors. In the seventeenth century, British farmers imported various agricultural techniques from the Netherlands, particularly the four-field rotation method that enabled the fixing nitrogen to the soil. As a result of the doubling of the British population (from 6 to 12 million) from 1760 to 1820, the demand for agricultural products piqued, providing a powerful incentive for further improvements. The intensification of the agricultural production required to feed a growing population

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139 Bayly, The Birth, 27.
141 Ibid., 9-10.
144 Francis Pryor, The Making of the British Landscape: How We Have Transformed the Land from Prehistory to Today (London, Penguin Books, 2010) 489. There are various reasons for British population growth. One of the most important was the introduction in Europe of the cultivation of a tuber original from the Americas: potatoes doubled Europe’s food supply in terms of calories. See Charles C. Mann, 1493: How Europe’s Discovery of the Americas Revolutionised Trade, Ecology and Life on the Earth (London, Granta Publications, 2011) 209. In addition, foodstuffs from the colonies such as sugar and protein-
would have exhausted the soils were it not for Peruvian guano, a natural fertilizer. Its utilization allowed increased productivity without depleting the fields under cultivation. In 1841, Britain imported 1,800 tons of guano from Peru, an amount that increased to 219,764 tons only four years later.\textsuperscript{145}

The upsurge of land productivity due to fertilizing and technology accelerated the process of enclosure in the late eighteenth century.\textsuperscript{146} Deprived of their means of subsistence, a growing number of peasants looked for a wage salary in the cities, contributing to an urban demographic explosion. Despite the quickening of the tempo of agrarian transformations, the extent of the change should not be exaggerated.\textsuperscript{147} Yield increases were relatively minor compared to the rate of population growth. Once the Corn Laws were repealed, Britain had to import food during the nineteenth century in order to satisfy internal demand.\textsuperscript{148} This notwithstanding, the British model became a blueprint for the modernization of cultivation and the transformation of agricultural landscapes worldwide.

The origins of the Industrial Revolution were as multifaceted as the causes of the agricultural revolution. Improvements in manufacturing began with the cloth trade.\textsuperscript{149} At first, farmers combined cultivation with fiber separation, spinning and weaving as a way of diversifying their sources of income.\textsuperscript{150} The success of these new economic activities soon encouraged most families to dedicate their time to textile-related tasks. The desire to compete with Indian calicoes and muslins and the restriction on imports from India provided the springboard for the mechanization of the textile industry.\textsuperscript{151} Production was divided into separate and simple tasks, and the first factories began their operations.\textsuperscript{152} The seeds of change had already been planted. The rationalization and modernization of manufacturing and the standardization of production were soon replicated in the old artisan trades.\textsuperscript{153}

\textsuperscript{145} Ibid., 215.
\textsuperscript{147} Pryor puts in doubt the convenience of talking about a revolution, instead suggesting the idea of cumulative change encompassing faster and slower periods of change. See Pryor, \textit{The Making}, 474.
\textsuperscript{148} Ibid., 491.
\textsuperscript{151} Ibid.
\textsuperscript{152} Headrick, ‘Technology’, 239.
\textsuperscript{153} Maxine Berg, \textit{The Machinery Question and the Making of the Political Economy, 1815-1848} (Cambridge, Cambridge University Press, 1980) 2. Notwithstanding the high degree of industrialization in Britain, it should be noted that segments of
The combination of high wages and cheap coal fostered the substitution of human laborers by machines, providing the incentive and the means to modernize production. The exploitation of coal required a series of innovations in mining that were later applied to other industries. In spite of these rapid changes, industrialization was confined to certain areas in northern and central England before the railway appeared. Developments in transportation and communication gave the Industrial Revolution a wider scope by cutting the costs of moving goods across frontiers. As the world became smaller, production and trade blossomed. From 1870 to 1890 iron production in the main producing countries more than doubled. In the case of steel, the increase was twentyfold. The market integration of the Atlantic economy (a key factor for Europe’s rise to dominance in the world economy during the nineteenth century) after 1860 was predominantly the result of reduction in transportation costs. These changes surpassed the European ambit. In India, for example, the introduction of the steamboat substantially enlarged the grain trade.

During the nineteenth century, the integration of the world economy accelerated, reaching historic heights. The volume of global trade from the beginning of nineteenth century to the first decade of the twentieth century increased twenty-five-fold. As a proportion of economic output, it surpassed the level reached at the beginning of the twenty-first century. Thanks to new communication technologies, information on prices, supply, and demand travelled rather swiftly, creating new possibilities for long-distance trade. Besides, by 1880 the cost of certain commodities, like food grains, depended on their price on the world market. This process of homogenization and standardization applied to weights,
measures, time, and currency, further contributing to the creation of a rationalized international market economy.\footnote{Prasenjit Duara, ‘Modern Imperialism’ in Bentley (ed.), \it{The Oxford Handbook}, 379-395, 381.}

A sound financial infrastructure facilitated the exchange of goods within and between nations, as well as the construction of railways.\footnote{Lane, \it{After Tamerlane}, 240.} In England, merchant bank houses such as Barings, Rothschild, and Hope had already started their lending business during the eighteenth century.\footnote{Mokyr, \it{The Enlightened Economy}, 221.} Yet, in the nineteenth century, their financing of economic activities acquired capital importance. The Barings House, for instance, acted as financial agent for business groups that operated in the British Empire.\footnote{Foreman-Peck, \it{A History}, 68.} The Bank of England, the stock exchange, and the gold standard established the foundations of the new international monetary system and provided the financial structure that glued the different pieces of the international capitalist economy together.\footnote{A negative outcome of economic integration was that economic recession in particular key capitalist countries could spur an economic crisis of global proportions. See Osterhammel and Petersson, \it{Globalization}, 79-80.}

The creation of machines and the use of fossil fuels gave humans the possibility of altering and manipulating natural forces almost at will. ‘Industrial beings’ could easily perforate the subsoil, cultivate enormous areas of cash crops as monocultures, cut trees and kill animals at a faster rate than ever before, and easily transport all that was valuable in nature to distant centers of consumption. The conjunction of European imperialism and the emerging global capitalist economy propelled the forces of environmental change to Latin America, North America, Africa, South Asia, and Oceania. The world was now an immense reservoir of commodities. Exploration and colonization gave Europeans the possibility of studying non-European ecosystems in order to find plants and natural species whose cultivation and extraction had the potential of being profitable for the metropolis.\footnote{Londa Schiebinger and Claudia Swan (eds.), \it{Colonial Botany: Science, Commerce, and Politics in the Early Modern World} (Philadelphia, University of Pennsylvania Press, 2005) 2.} Overall, the knowledge, techniques, and technologies produced within industrial societies allowed humans to manipulate and alter natural ecosystems in ways that were unthinkable before this era.

European overseas expansion during the first half of the nineteenth century mainly took the form of settler colonialism. This process was part of a larger phenomenon whereby European farmers displaced the ‘original’ inhabitants of Brazil, Argentina, Canada, the U.S., Australia, South Africa, and other territories in order to grow cash crops for export.\footnote{Kenneth Pomeranz, ‘Advance agriculture’ in Bentley (ed.), \it{The Oxford Handbook}, 246-266, 252.} The reduction of Ocean freight rates made the
cultivation of the far corners of the world economically profitable. In the so-called temperate ‘Neo-
Europe’, settlers of European descent used European agricultural machinery to extract more surplus from
the land.

After U.S. independence in 1783 an ‘Anglo-world’ was born. Great Britain established settlements
in Canada, Australia, New Zealand, and South Africa, while the U.S. extended west of the Mississippi
over a vast area of land. A constant transfer of goods, people, and ideas interconnected this conglomerate
of Anglophone settlements. It constituted a sub global network of staggering proportions. So, during
the first half of the nineteenth century, the Industrial Revolution went hand in hand with the settler
revolution that saw Anglo-Saxons and their economies occupying large areas of the Earth and creating
vast empires.

The Industrial Revolution, population growth, and the increase of natural products had an effect on
colonial territories and their people. Cotton provides a good example. The annual consumption of cotton
in Great Britain during the first years of nineteenth century was only 24,000 tons. Less than 20 years
afterwards that amount had grown to 120,000 tons. As the amount of cotton consumed in Great Britain
continued to grow, and textile factories were established in New England, the demand for cotton climbed
sharply. Cotton plantations mushroomed in the southern U.S. to feed the growing international market.
In states like Georgia, which cultivated cotton, the value of the territories of the Cherokee and the Creek
increased exponentially. As we shall see in Chapter 8, this fact was to have enormous implications for
the very survival of these North American societies. The U.S. administration under Andrew Jackson
decided to implement a policy of removal, freeing vast tracts of land for industrial agriculture.

The demand for natural products in settler colonies grew exponentially. Grapes, oranges, dates,
bananas, pineapples, vines, silk, arrowroot, tobacco, olives, wheat, wool, meat, whale’s products, etc.
were produced in Australia. Millions of sheep and cattle trod the grazing lands where game hunted by

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173 Ibid., 253.
175 This is the term used in James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783-1939* (Oxford, Oxford University Press).
176 Ibid., 49.
177 Ibid.
178 Ibid., 53.
179 Ibid.
180 See *supra* Chapter 7, pages 330-331.
Australian peoples used to feed. Soon they depleted the biodiversity of this complex ecosystem, impairing the survival of Australian peoples. In the south of the U.S. commercial agriculture specialized in the production of indigo, corn, rice, sugar, tobacco, and cotton. Whenever and wherever a profitable industry was born out of the cultivation of food or the extraction of natural products, the systematic exploitation of ecosystems followed. The result was a vast clearance of land for agriculture; massive hunting that decimated and drew species to the verge of extinction or actual disappearance; the building of cities, roads, ships, bridges, and locomotives that demanded the increasing destruction of forests; the industrial extraction of minerals from the subsoil, etc.

All these economic activities were projected to a global scale. As settler nations consolidated, cities doubled or tripled their size, and a mass market for consumption was created. As a consequence, the demand for natural products intensified. This demand was satisfied by opening new territories to the acquisitive impulse of Western imperialism. At the end of the nineteenth century, European colonial powers set their sights on Africa and Asia. Africa, in particular, offered the prospect of new riches and profits by merely extending the invisible hand of the global market to the interior of the continent. As in other European colonies, both African and Asian peoples and nature suffered from the greed of the colonists. In spite of the depopulation caused by African conquest, the scale of human induced environmental change in Africa intensified during the nineteenth century as a result of the subordination of local economies to the requirements of the new international commodity markets of coffee, cocoa, groundnuts, palm oil, cloves, rubber, ivory, wood, and minerals.

By the end of the nineteenth century, colonial production everywhere was tied to the world market. Javanese peasants, for instance, produced tobacco, sugar, and rice. The Cape of Good Hope concentrated on wine and hides for the European market. In Australia, the production of wool for the textile industry skyrocketed. British settlers in West Africa focused on extracting palm oil. New products such as tea, rubber, nickel, and oil, which were cultivated or extracted in temperate zones and tropical areas, deserts, and even arctic forests, complemented old trades. Nineteenth century geographic expeditions pushed

184 The Bison provides a good example. See infra page 51.
185 McCann, Green Land, 3. See also Gregory H. Maddox, Sub-Saharan Africa: An Environmental History (Santa Barbara, ABC-CLIO, 2006) 5.
186 Bayly, The Birth, 131.
hard to unveil the secrets of the world’s last natural frontiers.\textsuperscript{188} Once those frontiers were opened, they could be conquered and integrated as part of the growing reservoir of natural products that fed international markets.

Apart from driving the exploitation of natural habitats, the Industrial Revolution had another important environmental consequence. It reinforced the Enlightenment assumption that the control and command of nature led to material improvement and social progress.\textsuperscript{189} As the natural frontier expanded and the bounty of nature was squeezed, standards of living continued growing. In the nineteenth century, there was still ample room to intensify that process. This was, at least, what the Europeans believed. Whereas the industrial landscapes of Europe were a vivid proof of the advancement of European civilization, most of the world’s habitats seemed still to Western observers to be rather underutilized.

4. Settler Colonialism and the Exploitation of Nature

\textit{U.S. expansion and environmental degradation in North America (1800-1860)}

The extension of U.S. power west of the Appalachians to the Pacific Coast was the beginning of a new empire. There were two main victims of that process of expansion. North American societies were decimated and reduced to reservations. Alongside, the demands of the market economy that drove U.S. expansion resulted in the degradation of myriad ecosystems. Mechanized agriculture, industrial mining, overhunting, ranching, the timber industry, railways, ships, roads, urbanization, etc. left a lasting impact on the environment. As important as these activities were, they could not have taken place without an institutional apparatus and an ideological framework to support them. International law as well as the U.S. legal system acknowledged the imperative of the market, promoting a particular worldview that was to have deleterious environmental consequences in the U.S. and the rest of the colonial world.\textsuperscript{190}

From the eighteenth century, the landscapes of the southern U.S. were a succession of plantations. These agricultural enterprises enormously reduced the biodiversity of the region.\textsuperscript{191} At different historical periods rice, sugar cane, indigo, tobacco, and cotton were grown extensively. Louisiana provides a good example to put into perspective the mushrooming of agricultural plantations. At the beginning of the eighteenth century, in 1802, there were only seventy-five sugar plantations, which produced a combined

\begin{itemize}
  \item \textsuperscript{188} This is the spirit that runs like a thread through Jules Verne’s book collection of \textit{Les Voyages Extraordinaires}.
  \item \textsuperscript{189} Mokyr, \textit{The Enlightened Economy}, 30-62.
  \item \textsuperscript{190} For the United States see Sowards, \textit{Unites States}, 85.
  \item \textsuperscript{191} Davis, \textit{Southern United States}, 113.
\end{itemize}
5 million pounds of sugar. 192 Twenty years later that amount had increased to 30 million, reaching a maximum of 459 million pounds by mid-century. 193 The cultivation of rice, indigo, sugar, and tobacco caused deforestation and soil erosion. 194 Still, the impact of these staples was not comparable to the environmental transformations that resulted from cotton plantations.

In England, the Industrial Revolution moved to high gear through the textile industry. Accordingly, the demand for raw textile materials grew exponentially during the first decades of the nineteenth century. By 1800, seventy percent of the 58 million pounds of cotton imported by Great Britain came from the southern U.S. 195 Eventually New England started to compete with British industries, increasing even further the demand for cotton. The cotton industry was one of the main engines of economic growth in the U.S. It resulted in an increase in population and fostered investment, transportation, labor, and industrialization. 196 Cotton was the most important staple of the American South and occupied most of the fields planted in South Carolina, Georgia, Alabama, Mississippi, Louisiana, and extended as well to Tennessee and Arkansas. 197

Only the effects of tobacco were as detrimental to North American soils as the impact of cotton. Cotton depleted the ground of nutrients and caused severe erosion. 198 This had enormous environmental implications considering how widespread cotton plantations were in the American South. By 1860 cotton destined for domestic consumption as well as export occupied more than 7 million acres of land in the region. 199 Almost every region in the American South had more than 80 percent of its territory dedicated to agriculture. 200 There, where cotton was cultivated, erosion ensued. 201 But erosion was not the only effect of the Southern economy on ecosystems. Hunting reduced the number of deer by hundreds of thousands, contributing also to the disappearance of elks and buffalos from the region. 202 Cattle completely destroyed native herbs and compacted the soils of pastures and forests. 203 Mining caused

192 Ibid., 118.
193 Ibid., 118-119.
194 Ibid., 109-121. See also, Merchant, The Columbia Guide, 47-49.
195 Davis, Southern United States, 122.
196 Ibid., 125.
197 Ibid., 122-125.
198 Ibid., 125.
199 Ibid.
200 Ibid., 131.
201 Ibid., 128.
202 Ibid., 134-138.
203 Ibid., 142.
deforestation and the pollution of riverine ecosystems.\textsuperscript{204} Overall, the natural abundance of Southern landscapes reduced significantly.

Buffalos were one of the animals that suffered most from the impact of hunting and the shrinking of natural habitats. From a starting point of somewhere between 30 to 60 million bison before European colonialism, buffalo were reduced to only a few hundred by the mid-1880s. Although the Bison steadily disappeared from the South of the U.S. at the beginning of the nineteenth century, there were still millions of them in the immense grasslands of the interior.\textsuperscript{205} The introduction of the horse and the rifle among the Comanche facilitated Buffalo hunting, making the bison the cornerstone of their economic and social lives. European market demands for bison products further spurred on their killing. Several other North American nations, such as the Cherokees, Chickasaws, Choctaws, and Creeks, also had an active role in the killing of bison.\textsuperscript{206} By the 1850s, a combination of climatic factors, religious ideas, and overhunting by the Comanche had severely reduced bison herds.\textsuperscript{207}

However, the final blow to the survival of bison came from U.S. markets and U.S. hunters. First, the locomotive entered the U.S. prairies, allowing the transportation of goods from the East to the West coast in less than a week.\textsuperscript{208} Then, the leather of the buffalo was applied to the belts of steam engines in Europe and the U.S. Due to this new industrial use of bison hides, demand skyrocketed.\textsuperscript{209} Accordingly, the sale of bison hides became extremely profitable in U.S. industrial cities and a new industry was organized around their extraction in the 1870s.\textsuperscript{210} In less than two decades, U.S. hunters killed buffalo by the millions (they sold 14 million hides) and almost exterminated them.\textsuperscript{211} North American peoples suffered terrible loss. As bison withered away, their economy suffered a major setback, and thousands starved and perished.\textsuperscript{212} Avid hunting for profits took place with the connivance of the federal authorities, eager to diminish the supplies of the Comanche and other North American peoples who still resisted their authority.\textsuperscript{213}

\begin{flushright}
\textsuperscript{204} Ibid., 150-155.
\textsuperscript{206} Pekka Hämäläinen, \textit{Comanche Empire} (New Haven, Yale University Press, 2008) 294.
\textsuperscript{208} Lott, \textit{The American Bison}, 175.
\textsuperscript{209} Ibid., 176.
\textsuperscript{210} Ibid., 176-178.
\textsuperscript{211} The figure of 14 million hides is given in Belich, \textit{Replenishing the Earth}, 191.
\textsuperscript{212} Only the Comanche population was reduced to a third as a result of hunger. See Hämäläinen, \textit{Comanche Empire}, 339-340.
\textsuperscript{213} Isenberg, \textit{The Destruction}, 4.
\end{flushright}
The environmental effects of territorial expansion and its accompanying economic growth were visible all over the U.S. The West Coast provides another good example of this trend. The industrialization of mining, agriculture, pastoralism, and fisheries drove environmental change. The gold rush in the West, especially in California, had deleterious consequences for the environment. Hydraulic mining entailed the use of an immense amount of water (some companies used more than a billion cubic feet of water) to move land in search of gold ores. In California, the power of water moved 1.5 billion cubic yards of debris from the Sierra Nevada foothills between 1855 and 1885. The amount of sand, soil, and gravel washed away reached as far as the San Francisco Bay and represented eight times more than the earth displaced for the construction of the Panama Canal.

As in the South, mining caused the destruction of mountain and riparian ecosystems. Hills and mountains around the mines became deserts of stone. Erosion of agricultural lands, deforestation, siltation, and flooding followed hydraulic mining. Another widespread mining system, hard-rock mining, equally polluted the water and air. In addition, Californian companies decided to add mercury to the process of mining, provoking the most destructive and long-lasting effect on nature. The quicksilver mine of New Almaden (south of San Francisco) alone produced 1.7 million pounds of mercury per year. Tons of mercury filtered into the rivers and the atmosphere of the U.S. West Coast. Its toxicity entered the food chain and accumulated in animal tissue, reaching concentrations 100,000 times higher than those of the environment around them. Biodiversity in the U.S. was reduced as dramatically as its forest cover. Trees were cut to open up space for agriculture, fuel, the construction of buildings, railroads, ships, bridges, roads, machines, mines, etc. Forest fed the U.S. industry. Accordingly, deforestation intensified as the Industrial Revolution gained momentum during the second half of the nineteenth century. From 1750 to 1900, 142 million hectares of forest were cut to make space for agriculture. An additional eight million fell due to the

214 Sowards, United States, 93.
217 Sowards, United States, 99.
218 Ibid., 95. See also Beeslay, Crow’s Range, 56-57 and Andrew C. Isenberg, Mining California: an Ecological History (New York, Hill and Wang, 2005) 47-50.
219 Ibid., United States, 95.
220 Ibid.
221 From 1850 to 1869, in less than two decades U.S. settlers cut half the amount of the trees (24 million hectares) they had destroyed in the previous two centuries (40.4 million hectares). See Williams, Deforesting the Earth, 286.
222 Ibid., 308.
requirements of industry, transportation, mining, and urbanization. In total 150 million hectares were gone, the equivalent of half the original forest landmass of North America. This represented one of the largest episodes of deforestation in world history. The beginning of industrialization was the main reason for environmental degradation. However, the assault on nature had already started with the new ideas and practices introduced by the establishment of the first colonial settlements.

As in the rest of the U.S., capitalism and the legal, political, and ideological structures that sustained it drove environmental destruction. Referring to the West Coast, Sowards has argued that ‘capitalism exploited nature to fuel economic expansion’, producing the devastation of the ‘regions’ resources by reducing them to commodities whose only value was their market value. As we shall see in the following chapters, the law of nations enabled the extension of the logic of appropriation to the world’s vast supposedly unexploited territories and vacant ecosystems from which capitalism fed. This logic was not only applied during the U.S. expansion. Far from the U.S., there were other savages and natural habitats, which, according to the law of nations, could also be occupied, improved, and civilized.

Australian ecosystems: before and after British colonization

The size of the pre-contact population of Australia when the British explored the western coast in 1788 remains disputed, with figures ranging from a minimum of 300,000 to a maximum of 1.5 million. Several authors agree on an intermediate figure of about 750,000. The ecological limits of natural habitats and factors such as climate change forced Australian peoples to adapt to external environmental conditions. For this reason, Australian landscapes were the result of a centuries-long process of continuous interaction and mutual adaptation between humans and nature (if one could ever really draw a clear-cut line between the two).

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223 Ibid.
224 Ibid.
225 Ibid., 284.
226 Sowards, United States, 125.
228 See Butlin, Economics, 139. See also Noel G. Butlin, Our Original Aggression: Aboriginal Population of South-Eastern Australia 1788-1850 (Sydney, Allen and Unwin, 1983) 114-117.
Despite the view of Australian original inhabitants as a backward and primitive people,\textsuperscript{230} and their surroundings as a wilderness, their social achievements showed a remarkable resourcefulness. The island seamen, for instance, could differentiate sea locations by the taste of salty water (apparently every part of the sea had a distinct taste), the patterns of waves and swells, and the disposition of the stars.\textsuperscript{231} They built vessels, fished, sailed, and participated in the cinnamon trade across the Indian Ocean.\textsuperscript{232} The ability of adapting house building techniques to the requirements of different settings and weather conditions are further proof of an adaptable and sophisticated culture.\textsuperscript{233}

Three main questions have come to the fore in the debate about the extent to which the peoples of Australia altered ecosystems before British colonization. The first disputed issue is their role in the extinction of Australian megafauna. Already in the nineteenth century, human agency was identified as the main agent of the total disappearance of megafauna.\textsuperscript{234} In contrast, other authors believed that climate change was responsible for the extinction process.\textsuperscript{235} Current positions do not differ much, with studies that alternatively emphasize anthropogenic or climatic causation.\textsuperscript{236} There are also studies that draw a middle line combining both factors.\textsuperscript{237} In those cases in which the peoples of Australia were found to be responsible, overkilling\textsuperscript{238} and the destruction of ecosystems due to intensive burning\textsuperscript{239} were hypothesized as causes for the Pleistocene extinctions.

\textsuperscript{230} It is still possible to find this opinion in contemporary scholarship. See, for instance, Frank Welsh, \textit{Australia: A New History of the Great Southern Land} (Woodstock, Overlook Press, 2006) 23.
\textsuperscript{231} According to Rolls, this is something that Europeans could not do. See Eric Rolls, ‘The Nature of Australia’ in Tom Griffiths and Libby Robin (eds.), \textit{Ecology and Empire: Environmental History of Settler Societies} (Edinburgh, Keele University Press, 1997) 35-45, 36.
\textsuperscript{232} Ibid.
\textsuperscript{233} Ibid.
\textsuperscript{237} See, for instance, Graham W. Prescott et al., Quantitative Global Analysis of the Role of Climate and People in Explaining Late Quaternary Megafauna Extinctions’ 109 \textit{Proceeding of the National Academy of Science of the United States of America} (2012) 4527-4531.
The peoples of Australia used fire as a resource management technique. Large areas of forests were cleared by fire in order to open space for cultivation and attract animals to pastures.\textsuperscript{240} The nature and impact of the use of fire is also controversial. Regarding the first question, whereas some authors define that use as judicious and positive,\textsuperscript{241} others have underlined the negative effects of Australians’ use of fire.\textsuperscript{242} The politics of conservation in ‘modern’ Australian and the alternative depiction of Australian peoples as either conservationist or inept managers of resources have complicated this debate.\textsuperscript{243}

As far as the impact of fire is concerned, views have ranged from the claim that Australian grasslands mostly originated from past human-induced fires\textsuperscript{244} to the contrary thesis that fires have had a minimal impact upon Australian vegetation.\textsuperscript{245} Both these claims seem to be an overstatement. It is now the consensus that Australians’ use of fire served to introduce/select particular plant species, which in turn maximized productivity, increased biodiversity, and expanded their natural habitat zone. This view is supported by evidence of the positive ecological effects of fire practices currently undertaken by the peoples of Australia, based on their sophisticated knowledge of ecological processes.\textsuperscript{246}

Last but not least, there has been a heated debated concerning the ‘narrative of intensification’. According to this account of Australian history, sometime during the Holocene the hunter-gatherer communities experienced a series of changes driven by sociocultural factors.\textsuperscript{247} These included an increase in the number of sites and intensity of occupation, the appearance of new types of stone

\textsuperscript{242} See Rhys Jones, ‘The Geographical Background to the Arrival of Man in Australia and Tasmania’ 3 \textit{Archaeology and Physical Anthropology in Oceania} (1968) 186-215. See also Sylvia Hallam, \textit{Fire and Heart} (Canberra, Australian Institute of Aboriginal Studies, 1975).
\textsuperscript{247} Harry Lourandos, ‘Intensification: A Late Pleistocene-Holocene Archaeological Sequence from Southwestern Vitoria’ 18 \textit{Archaeology in Oceania} (1983) 81-94.
technology, the ‘domestication’ and further manipulation of plants as food resources, and more regionalized forms of art.248

The ‘narrative of intensification’ had the positive effect of challenging environmentally deterministic ideas about hunter-gatherer societies. It also questioned the strict divide between hunter-gatherer and agriculturalist societies.249 Allegedly, both abstract social types had more in common than was traditionally recognized. Nevertheless, there have been a number of criticisms of the ‘thesis of intensification’. Some scholars have either underlined inadequacies in the data on which the thesis was based or defied the conclusions drawn from it.250 Others have focused on the political implications of challenging the opposition between the categories of hunter-gatherers and agriculturalists. Trying to squeeze the former into the latter seems like trying to raise hunter-gatherers one-step higher in the ladder of social evolution. This could have the counter effect of cementing the very logic of progress that sought to be challenged in the first place.251

Despite the complexity and nuances of these three debates,252 they have all similarly contributed to the demythologization of the image of a primeval Australia and a pre-colonial population unable to modify and improve their wild surroundings. We now know that the peoples of Australia had a profound and lasting influence on their habitats and that their ecological practices were knowledgeable, flexible, and dynamic. In spite of the undeniable and broad impact of Australians on the flora and fauna, they generally maintained the productivity of the land.253 Therefore, their relationship with nature was largely sustainable.254 Sustainability was not the result of an inherent quality of the peoples of Australia, but

249 In the words of the most famous exponent of the thesis: ‘Australian hunter-gatherer societies overlapped to some extent with many Guinean hunter-horticulturalists in relation to population sizes and densities, hunting-gathering fishing practices, levels of land and resource management (for example, plants and fish), social formation, ritual and exchange.’ Harry Lourandos, Continent of Hunter-Gatherers: New Perspective in Australian Prehistory (Cambridge, Cambridge University Press, 1997) 325.
250 For a review see Simon Holdaway, Patricia Fanning and Ed Rhodes, ‘Challenging Intensification: Human-Environment Interactions in the Holocene Geoarcheological Record from Western New South Wales, Australia’ 18 The Holocene (2008) 411-420, 412.
254 Ibid. The same view can be found in Bill Gammage, ‘Sustainable Damage: The Environment and the Future’ in Dovers (ed.), Australian Environmental History, 258-267, 260. Rolls also believes that in no other part of the world the land had been treated as gently as in pre-colonial Australia. See Rolls, ‘More a New Planet’, 22.
rather the historical result of centuries of trial and error undertaken by societies whose survival depended on the preservation of their habitats and natural resources.\textsuperscript{255}

That scenario changed with the arrival of the British. Initially the British settlements in Australia went through a period of hardship. But once the colonies eventually boomed in the mid-nineteenth century, the environmental effects of the colonial economy on Australian landscapes were numerous. Animals, like kangaroos, were killed by the millions, while others were simple exterminated. In order to get timber and open space for agriculture and pastoralism, colonists cleared millions of hectares of forest and destroyed other indigenous vegetation. Uncontrollable fires that left in their wake degraded landscapes further devastated Australian vegetation. In Australia, the most fire-prone continent on Earth, the unsound burning techniques of pastoralists, farmers, and gold prospectors could sometimes turn catastrophic.

In addition to vegetation, the need to supply water to the main urban settlements exhausted aquifers. In the countryside, countless herds of sheep, counted by the millions, caused soil compaction and erosion, destroying edible plants and polluting water streams. Finally yet importantly, the nascent mine industry generated large amounts of water and soil pollutants that added to the overall ecological footprint of the colonists and their way of living.\textsuperscript{256} Overall, the British settlers’ economic achievements came at the expense of ‘severely depleted ecosystems’.\textsuperscript{257}

The degree of loss of the forest cover in Australia is one of the elements that helps put into perspective the impact of the colonial economy. From the establishment of the first settlements to the end of the nineteenth century, deforestation amounted to one-third of the pre-colonial forest, approximately 87.6 million hectares out of 244 million.\textsuperscript{258} To this day, half of the forests of Australia have either been cut down or are severely depleted.\textsuperscript{259} In addition, the cultivation of the land after European settlement and pastoralism caused the deterioration of two-thirds of all arable land.\textsuperscript{260} In New Zealand, forests shrank

\textsuperscript{257} Garden, \textit{Australia}, 63.
\textsuperscript{258} Williams, \textit{Deforesting the Earth}, 311-314.
\textsuperscript{259} Bradshaw, ‘Little Left to Lose’, 111.
\textsuperscript{260} Lines, \textit{Taming}, 12.
25 percent in relation to their pre-colonial cover. In addition, 14 percent of the country was cleared in order to open space for a pastoral economy.

Between 1700 and 1920 the total disappearance of forests in the temperate world amounted to 315 million hectares. Of this large figure, between 230 million hectares alone came from deforestation in the U.S. and Australia. An additional 146 million hectares of temperate forest were turned into cropland. Loss of forests produced a loss of biodiversity and triggered other ecological processes such as desiccation, soil erosion, or/and the extinction of species.

5. European Imperialism (1850-1920): Opening up Asian and African Ecosystems

The impact of nineteenth century imperialism and colonialism on nature was notorious. However, from an environmental perspective these phenomena did not constitute a sharp historical break or watershed. In fact, they were part of a larger ‘developmentalist paradigm’ characterized by state-building, sedentarization, and the intensification of natural resources exploitation that was also underway in Japan, the Ottoman Empire, China, Russia, Egypt, and South Asia. In China, for example, commercialism without capitalism resulted in substantial environmental transformation. Deforestation and environmental degradation were the price of the escalation of fuel demand triggered by economic development.

Moreover, the environmental impact of European imperialism was often added to deeply modified environments that in several cases had already suffered deforestation and erosion. The Western belief

261 Williams, *Deforesting the Earth*, 317.
262 Ibid.
263 Ibid., 318. One can picture the proportion of forest cut, thinking that this figure amounts to a country almost the size of India (329 million hectares).
264 This amounts to a country almost the size of the Democratic Republic of Congo (234 million hectares).
265 Williams, *Deforesting the Earth*. This figure amounts to the size of a country almost the size of Mongolia (156 million hectares).
269 Richards, *The Unending Frontier*, 112-147. See also Lane, *After Tamerlane*, 193-194.
that Africa or South Asia for that matter were still an untamed ‘wilderness’ was at odds with reality.\textsuperscript{270} Nature in the supposedly wild African continent, as elsewhere, was largely anthropogenic.\textsuperscript{271} African landscapes were the result of the combination of timeless African muscle, tools, and ideas.\textsuperscript{272} Some habitats revealed the existence of complex civilizations and empires, which skillfully modified their surroundings. For instance, the Aksum Empire, situated in the high lands of Ethiopia and Eritrea, developed impressive forms of engineering, military capacity, and commercial networks, being an active participant in the world economy of the time.\textsuperscript{273} Its wealth stemmed from a privileged location at the center of several trading routes and from ingenuity and creativity in managing the Empire’s ecological resources.\textsuperscript{274} But not all African societies had reached a sustainable ecological balance before European colonial powers partitioned the continent. One example of a lack of sustainability was the collapse of the Great Zimbabwe in the fifteenth century, partly due to environmental overexploitation.\textsuperscript{275}

As European imperialism, industrialization, and the capitalist penetration of the non-European world progressed during the nineteenth century, the demand for raw materials accordingly intensified. New networks of capital, trade, and production increased the incentive to harness ecosystems in search for new commodities. The rationale behind the apprehension of the world’s natural wealth was not just to make the environment more productive, but also to bring it under the increasing control of the colonial administration. Often these two aspects intertwined. Large dams, for example, brought nature into order while transforming subsistence agriculture into a commercial activity.\textsuperscript{276} The increasing exercise of power over the environment had a cost. Colonial hydraulic projects in the British Empire, especially India, deteriorated riverine ecosystems, causing the diminution of fisheries, the spread of waterborne

\textsuperscript{272} Ibid
\textsuperscript{273} Ibid., 36-37.
\textsuperscript{274} In McCann’s words: ‘Despite the evident sophistication of its elite material culture and extensive trade contacts, however, one could easily argue that the true genius of Aksum was its environmental management in smoothing and adjusting the vagaries of the seasons and its ecological setting.’ Ibid., 42.
diseases, seepage, waterlogging, salinity, and malaria. Water-loss from evaporation could reduce the
efficiency of canals by 60 to 70 percent.

One of the main environmental effects of Western imperialism in the nineteenth century was
deforestation. The amount of forest destroyed varied in different locations. Due to the destruction of pre-
colonial populations (which meant less competition for resources) in the non-European temperate world,
where settler societies existed, the clearing of forests was larger than in the densely populated tropical
territories acquired by European powers. The great availability of timber in the former regions explains
why deforestation in temperate areas surpassed the felling of forest in the tropical world, which was
nevertheless considerable.

In India, forests were already under considerable human pressure before the beginning of British rule.
As population grew, they were transformed in fields for agricultural production. Under colonial rule,
two main factors intensified previous clearing. The production of cash crops for export subordinated
forest to global demands. Besides, the imposition of a colonial tax exacerbated land clearing to pay for
the levies. Processes of ecological degradation such as salinization, water-table losses, and soil erosion
often followed the loss of forest cover. As the productive capacity of forests was squeezed, the
possibilities of the local population to obtain traditional economic products from it sharply decreased.
For Guha, the difference between colonial rule and previous times was not that forest disappeared or
even that people were subjugated, but rather that the changes ‘had a sweeping and irreversible character
that they had never previously possessed’.

The colonization of South East Asia engendered a similar pattern of environmental alteration. Forests
and lands in this region were under intensive use for subsistence and trade purposes long before European

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277 See Elizabeth Whitcombe, ‘The Environmental Costs of Irrigation in British India: Waterlogging, Salinity, Malaria’ in
David Arnold & Ramachandra Guha (eds.), Nature Culture Imperialism: Essays on the Environmental History of South Asia
(Delhi, Oxford University Press, 1998) 237-259, 239. An important side effect of water engineering was the transformation
278 Ibid., ‘The Environmental Costs’, 139.
279 This group includes the settled societies of United States, Canada, Southern Africa, Brazil, Argentina, Australia, and New
Zealand. See Williams, Deforesting the Earth, 238. South Africa was an exception as it had a large original black population.
(Walnut Creek, Rowman and Littlefield, 2001) 136.
281 Ibid.
282 Ibid.
283 Ibid.
284 Williams, Deforesting the Earth, 335.
285 Ibid.
colonization. Yet, European imperialism introduced new methods of production to satisfy an increasing global demand for agricultural products, which increased the human pressure over the land. In Java, the Dutch introduced plantation agriculture oriented to the export of sugar, coffee, indigo, and tobacco. In order to establish plantations forests had to be cleared. The Dutch also concentrated in exploiting teak, a hardwood of great value for shipbuilding and construction. Annual production of teak rose from 16,700 logs in 1733-1765, to 145,000 in 1837-1865.

In Malaya, Burma, and British Borneo, rainforests served the imperial needs of the metropolis, particularly shipbuilding, which was vital for the maritime hegemony of the British navy. The provision of teak was of such a strategic value that Burma’s attempt to control its extraction was one of the main factors leading to the third Anglo-Burmese war. Burma’s deforestation resulted in the loss of local fishery stock, soil deterioration, and the extinction of some animal and vegetal species. As in the case of India, the local inhabitants found it increasingly difficult to get products that were essential to their daily life from shrinking forests, a fact that contributed to their economic hardship.

When the Philippines came under Spanish power in 1565, 90 percent of the island was covered by forest. By 1900, the percentage had fallen to 70 percent, which was a minor change in comparison to what had taken place elsewhere. As in other colonial territories, the subordination of land use to market requirements accelerated environmental change. Deforestation during the nineteenth century affected the part of the country—central Luzon—in which commercial crop plantations of tobacco, abaca, and sugar cane had been established. These activities were possible due to the softening of mercantilist restrictions and the opening of the island to world trade in the previous century. One of the main environmental consequences of forest destruction for the inhabitants of central Luzon was the desiccation

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288 Chew, World Ecological Degradation, 137.
289 Peter Boomgaard, South East Asia: An Environmental History (Santa Barbara, ABC-CLIO, 2007) 248.
290 Chew, World Ecological Degradation, 137.
291 Boomgaard, South East Asia, 248. See also James Rush, The Last Tree: Reclaiming the Environment in Tropical Asia (New York, Asia Society, 1991) 41
292 Chew, World Ecological Degradation, 137.
293 Ibid.
294 Williams, Deforesting the Earth, 347-348.
of lakes and swamps as the water-retentive quality of soils was lost. In addition, floods became more frequent and severe than ever before.297

Between 1850 and 1920, the overall felling of forests in South Asia and South East Asia reached a figure of 33 million hectares.298

In Africa, the environmental effect of European imperialism was also considerable. However, nature was partly safeguarded by the slow advance of capitalism into the interior of the continent. Human pressure on the continent’s ecology was kept in check for centuries due to the depopulation caused by the slave trade. In the nineteenth century, violent conquest, displacement of labor, disruption of food provisioning, and the introduction of diseases took additional millions of lives and contributed to famine crises, some lasting for as long as a decade.299 The cattle rinderpest disease that came from Europe killed 80 percent of infected animals, leaving pastoral communities in disarray, making them more economically vulnerable and, hence, dependent on jobs offered in plantation agriculture.300 The reduction of the African population like the collapse of the pre-colonial population in America allowed the regeneration of nature, above all in the Savannah areas.301

Before the 1870s the growing demand from international markets did not generally mean dispossession of land or decision-making capacity from Africans and their institutions.302 Events in the southern part of the continent altered that trend. The discovery of diamonds in Kimberley in 1866 and gold in the Transvaal in the 1880s led to a reorganization of territory and power relations in South Africa as the ownership of the mines was allocated to the white elite.303 As a consequence of mining, the value of the land suddenly rose and mines mushroomed. There was an imperative need to provide the mines with food for its work force and timber for its shafts.304 In order to assure land for these and other lucrative enterprises such as cattle ranching and crop exports, the colonial state allocated 75 percent of the land of

296 Ibid.
297 Ibid.
298 Williams, Deforesting the Earth, 335.
299 Ibid., 104 and 122. Davis claims that in the 1889-1891 famine, about one third of the Ethiopian and Sudanese population perished. See Mike Davis, Late Victorian Holocaust: El Niño Famines and the Making of the Third World (New York, Verso, 2001) 6. The Congo is perhaps one of the best examples of the heavy toll of lives of colonization. In the regime of terror installed in the Congo by the Belgium 8 to 10 million people perished. This is the figure that Koskenniemi gives. See Koskenniemi, The Gentle Civilizer, 158.
301 Maddox, Sub-Saharan Africa, 122.
302 Ibid., 111.
303 Ibid., 117.
304 Ibid., 118.
the South African Union to white settlers, while 40 percent of the African population was concentrated in reserves.\textsuperscript{305} Reserves became places of cheap labor that served as a work force for the mines.\textsuperscript{306}

The South African model was replicated in other parts of Africa, particularly in the British colonies. The result was a division between market-oriented production and the exploitation of natural resources mainly by white settlers and rural self-sufficient communities formed by Africans.\textsuperscript{307} The colonial state maintained that division, using coercive power if necessary, in order to assure the success of settlers’ economic enterprises.\textsuperscript{308} French planters ran their plantations more like capitalist firms than settler farms, with similar results.\textsuperscript{309} Intensive cropping methods caused the degradation of soils.\textsuperscript{310} Erosion was particular prominent in areas of European settlement in the South, North, and East of Africa.\textsuperscript{311} South Africa was an extreme case. By the 1930s, the government estimated that agricultural productivity had decreased by a quarter in only 25 years because of soil erosion.\textsuperscript{312}

African land was not the only element of the environment that was affected by the deployment of public and private economic power. Imperial hunting provoked a severe reduction of wildlife and the extinction of several species.\textsuperscript{313} In South Africa, hunting was especially important for the diet of pre-colonial populations. Nevertheless, the demand of game meat in the white settlements and imperial markets for animal products such as ivory intensified the degree of animal killing.\textsuperscript{314} By the late nineteenth, hunting shifted from a commercial enterprise into a cultural and racial expression of white dominance, masculinity, and sportsmanship.\textsuperscript{315} Economic and recreational factors explain the increase in wildlife hunting. The number of dead animals was considerable—the ivory trade in the Cape alone accounted for the death of 25,000 elephants in 20 years.\textsuperscript{316}

\textsuperscript{305} Ibid.  
\textsuperscript{306} Ibid., 124.  
\textsuperscript{307} Ibid., 118.  
\textsuperscript{308} Ibid., 129.  
\textsuperscript{309} Ibid.  
\textsuperscript{310} See Beinart and Coates, \textit{Environment and History}, 51-69.  
\textsuperscript{312} Ibid., 40.  
\textsuperscript{313} This reduction contrasted with a pre-European diverse and abundant fauna. See John McKenzie, \textit{The Empire of Nature: Hunting, Conservation and British Imperialism} (Manchester University Press, 1988)85-119.  
\textsuperscript{316} Beinart and Hughes, \textit{Environment and Empire}, 67.
As in Asia, forests were also cut in Africa to serve the needs of industrial capitalism. Between 1700 and 1920 the total disappearance of tropical forest in order to open space for agriculture (part of this land was cleared by locals, but cash crop capitalism contributed to a large part of the falling) was 222 million hectares. This number added to the 315 million ha cleared in the temperate world for agriculture (mostly plantation agriculture) amounted to 537 million ha. This number does not take into account the extra 146 million hectares of grassland turned into cropland in the temperate world.

**Concluding remarks**

The environmental history of Western imperialism is complex and multifaceted. One complicating element is the state of non-European ecosystems before the arrival of Europeans. Non-European pre-colonial societies differed enormously. Empires prospered alongside city-states, confederations, regional alliances, rural communities, and other types of political formation. Some societies thrived along the coasts; others built their power in plateaus, hills, or the rainforest. Some were movable and nomadic, others sedentary, and some alternated between both trends. Independently of their size and complexity, none of them was static. They all evolved, changing periodically in an effort to adapt to different circumstances and a cluster of factors that shaped their historical trajectory.

Their environmental impact was also diverse. In large part, it related to their productive activities, their consumption patterns, the nature of their natural habitats, and their population. For that reason, it is difficult to arrive at a definite conclusion about non-European patterns of nature alteration. While some pre-colonial societies had reached an ecological balance, others were unsustainable. However, despite variation, two general trends are evident. The idea that the world outside Europe was a wilderness was far from the truth. It would be more correct to say that no inch of nature was unaffected there, where humans had established their presence. The pristine and primeval reality that Europeans were thought to have discovered was largely their own creation (if for unintended reasons, as we shall later see). Despite non-Europeans’ undeniable imprint on the landscape and various instances of natural degradation, it is possible to affirm that the populations of America, Africa, and Oceania had reached a certain overall balance with their surroundings, largely because of their direct dependence on the products of their surrounding nature.

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317 Williams, *Deforesting the Earth*, 318. This figure amounts to the size of a country slightly bigger than India and Mexico put together.

318 Ibid. This figure amounts to an extension of territory two times the size of India.
Western imperialism dramatically changed that scenario. The imperative of acquiring profits out of colonial ventures resulted in environmental degradation. Apart from the localized destruction that this processes produced, one of the main effects of imperialism over non-European nature was the Europeans’ acquisition of a hegemonic power to define non-European ecosystems. As European colonists extended their presence and power worldwide, they tended to assume that most of the territories they visited, conquered, or administered were still virgin. For them, the world outside Europe appeared mostly as a wilderness, waiting to be conquered and easily amenable to their transformative power. This misconception is understandable, to a certain degree. As pre-colonial populations in various continents died by the millions, forests and ecosystems greatly expanded. Nature extended its reach in the colonies and so European colonists and commentators alike, who ignored the interconnection between these phenomena, naturally tended to suppose that this was an outgrowth rather than a tragic human-made phenomenon.

Once the natural world outside Europe was conceptualized and represented as a prolific blank sheet, a virgin space to be conquered, it was easy to argue persuasively that in those wild physical spaces society and civilization ought to be forged anew. The power to define the world outside Europe as a wild natural canvass gave rise to an even larger power: the power to build material civilization out of wild nature. This power, in turn, demanded an authoritative language that legitimized acquisition. Colonial nature ought first to be appropriated so that it could then be exploited. This cosmopolitan idea fit perfectly with a more mundane imperialistic interest in seizing profitable natural resources. As imperialism advanced, slowly but surely the natural environments of several continents became subordinated to the economic requirements of few European nations and the wealthy individuals that participated in the colonial enterprise.

Another effect of European imperialism was that it allowed consumption patterns in Europe to surpass what was environmentally sustainable. Europeans, with enough purchasing power, could consume as many natural resources as they wanted without needing to worry whether those resources could be obtained in Europe. Sugar, furs, tropical oils, spices, and exotic fruits added to the range of natural products at the disposal of European consumers. Thanks to colonial trade, myriad natural elements from Latin America, Australia, South East Asia, Africa, etc. fed international markets and wealthy mouths.

319 According to Arnold, the ‘travelling gaze’ of European travellers and colonists had a disciplining effect on nature, transforming it into an object of knowledge. The structuring power of ‘the gaze’ is discussed in David Arnold, The Tropics and the Travelling Gaze: India, Landscape and Science, 1800-1856 (Seattle and London, University of Washington Press, 2006) 28-35.
Exporting Europeans’ environmental impact—that is, having consumers that did not directly feel the impact of their actions on the ecosystems that surrounded them—facilitated the introduction of unsustainable patterns of nature alteration. This reality has not changed; it has actually intensified. Today huge urban populations can consume an unlimited number of natural resources without seeing and realizing the destruction that their consumption patterns cause.

An ever-growing amount of non-European territories was increasingly used in order to fulfill the consumption demands of wealthy outsiders, often at the expenses of the needs of the local populations. Environmental hegemony was the cornerstone of European and U.S. political and economic hegemony. Conversely, the inability to control and utilize their surrounding natural wealth explains the impoverishment of non-European regions and populations. For this reason, the environmental dimension of Western imperialism is an essential piece of the imperial puzzle.

In order to acquire a hegemonic position over non-European nature and exploit the world’s ecological niches Western nations needed a sound ideological basis. A universal legal language that allowed the manipulation and exploitation of nature was an indispensable part of the ideological repertoire of colonists. Since the conquest of America, the law of nations provided a vocabulary of private power that facilitated the appropriation of natural resources. Transcontinental and global economic power demanded legal institutions to privatize and commodify nature in a way that could be presented as universally legitimate and globally applicable.

As Western imperialism extended its tentacles over non-European territories, international legal commentators claimed that private property rights could be exercised in the new territories. Sometimes that justification was based on the fact that pre-colonial populations had already enjoyed them before the arrival of the Europeans. It was then natural that the same kind of rights would be guaranteed to the newcomers. In contrast, European intellectuals argued, at times, that backward non-Europeans did not have a notion of private property rights. In those cases, European scholars claimed that private legal entitlements engendered cosmopolitan progress. Intellectual power created compelling narratives and theories whereby private property rights came to define the kind of power that humans ought to have over nature in the colonies. All around the world the administrative and private power of the colonists put those narratives and doctrinal creations into practice.

For all these reasons, the environmental aspect of the international legal legitimation of colonialism deserves attention. As Andrew Fitzmaurice has claimed ‘… particular attitudes to the exploitation of
nature … permeated the entire experience of European expansion’. In the following chapters I would try to provide an outline of those attitudes, the legal instruments that helped put them into practice, as well as their legal outcomes.

Part II

THE SPANISH SCHOLASTICS AND THE COLONIZATION OF LATIN AMERICAN NATURE
(1511-1590)

Christopher Columbus’ arrival to Latin America inaugurated a series of momentous transformations in world history. It has, for instance, been related to the emergence of the capitalist world economy,¹ the beginning of the scientific revolution,² and even to the origins of modernity.³ These multifaceted processes left a profound mark on Latin American pre-colonial societies. In addition, the environment was one of the areas in which the enormous implications of the conquest of Latin America were more visible. Contemporary historians have, for example, shed light on how the conquest transformed the world’s trade and ecology,⁴ how it affected Latin American nature and environmental relations within the continent,⁵ and the way in which it set in motion a process of biological homogenization of planetary dimensions.⁶

Before the three Spanish caravels—La Pinta, La Niña y La Santa María—appeared on the horizon, Latin America had been mostly hidden to and protected from the intrusion of outsiders. For centuries, its ecological, political, social, economic, and cultural reality evolved at a pace in step with the complex internal dynamics of the continent. That was radically changed after Columbus’ voyage. From the moment the first conquistadores set foot on the continent, Latin America was both physically conquered and conceptually constructed.⁷

⁵ Miller, An Environmental History.
Latin American nature was already described in Columbus’ diaries with an eye toward the possibility of finding tradable commodities. The urgent need to make sense of Latin America, its nature and peoples, stemmed mainly from a desire to exploit its wealth. It was also largely influenced by the self-appointed universal mission of the Spanish Crown to integrate ‘the Latin American reality’ within a Catholic understanding of the world. For a long span of time though, the conquistadores had the upper hand in defining the actual approach to the recently acquired overseas territories, hence shaping Latin American life. In their fervent zeal to acquire natural resources, which could yield surpluses, and a labor force to make them productive, the conquest of the continent became a double-edged sword which entailed the subjugation of its inhabitants on the one hand and the appropriation and commodification of nature on the other.

It was not long before the rapid disappearance of the colonized population drew some members of the Dominican order to question the ideological basis of the colonial enterprise and denounce the ignominy of Spanish rule in Latin America. The first of these episodes of criticism serves as the chronological beginning of this section. After Montesinos raised an inflammatory voice against the destructiveness of the conquistadores in 1511, his fellow Dominicans followed suit, exploring in-depth the nature of the relationship between the peoples of Latin America and the Spanish monarchs. Ever conscious of the harshness of the conquistadores, they tried to protect Latin Americans from them. Importantly, they articulated that protection in language that was familiar to the Spanish, introducing legal and religious concepts alien to Latin Americans’ worldviews.

One of the ways in which the search for a more legitimate and humane vision of the Spanish Empire in Latin America concretized was the development of a vocabulary of universal rights. Articulated by Francisco Vitoria in his famous *relectio De indis*, these natural rights have been described by critical scholars as having contributed to Spanish economic, political, and cultural hegemony in Latin America. That being true, there is still a less obvious but equally important dimension of the economic rights that Vitoria enunciated, which has received scant attention. In the background of these rights lay a particular—Vitorian—understanding of the peoples of Latin America and the Latin American ecosystems. Moreover, the universal economic rights of the *ius gentium*, derived from a specific conception of the relationship between the social and natural spheres, paved the way for European environmental and economic hegemony.

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8 See John Cummins, *The Voyage of Christopher Columbus: Columbus Own Journal of Discovery Newly Restored and Translated* (London, Weidenfeld and Nicolson, 1992) 103. Descriptions of Latin American physical environment abound; some can be found on pages 100, 105, 125, 127, 139.
The recognition of a series of economic rights in Latin America helped redefine the relationship between people and nature on the continent, consolidating a more exploitative pattern of environmental alteration. The enjoyment of economic rights as part of the *ius gentium* in the context of a growing intercontinental trade fostered the privatization and commodification of eco-systems, contributing to the exploitation of Latin American natural habitats. Accordingly, there is an environmental aspect to the theories of the Spanish scholastics that needs to be explored.

In order to do so, I will examine in the following chapters the colonial arguments of two of the most distinguished Spanish intellectual actors during the conquest of Latin America—Francisco de Vitoria (1483-1546) and Bartolomé de Las Casas (1484-1566)—in conjunction with the important figures of Domingo de Soto (1494-1560) and José de Acosta (1540-1600). Studying these authors together will enrich the analysis by pinpointing similarities and differences of emphasis, scope, and/or perspective between them.

Vitoria is credited with being the father of modern *ius gentium*, a predecessor of international law. He is also the founder of the influential School of Salamanca, to which Soto belonged as well. One of his main pupils, Domingo the Soto developed and adapted Vitoria’s thought. Las Casas, on the other hand, has been portrayed as the forerunner of indigenous rights. In addition, he is considered one of the main exponents of the human rights discipline and the founder of modern collective human rights. His assertive stand in favor of Latin American inhabitants, unlike Vitoria, was not the intellectual pursuit of one who reflected from afar. He lived in Latin America and witnessed first-hand the sufferings of its inhabitants, explaining the stronger emphasis of his writings and advocacy.

Finally, José de Acosta made some of the most important ethnological observations about the peoples of Latin America. In fact, the publication of Acosta’s *Historia Natural de Las Indias* in 1590 is the date chosen as the chronological end of this section. Even though any chronological choice like this is rather artificial, it is true that several decades after Montesinos’ bold challenge to the most destructive aspects of Spanish colonization, Acosta’s work closed the circle, producing a manuscript that could serve as a guide.

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9 On this contentious point, Pagden reminds us that ‘although it is clearly false to speak of Vitoria as the father of anything so generalized and modern as “International Law”, it is the case that his writings became an integral part of later attempts to introduce some regulative principle into international relations’; that is, into the relationships between different commonwealths. See Francisco Vitoria, *Political Writings* (Edited by Anthony Pagden & Jeremy Lawrance, Cambridge, Cambridge University Press, 1991) xxviii.


to the government and evangelization of the peoples of Latin America. Following Las Casas and Vitoria to a certain extent, he gave detailed information about Latin American commonwealths, particularly about their level of social advancement. Latin American societies’ lack of capacity to master their surroundings became one of the most important parameters whereby he assessed the advancement of the communities that he observed.

The pronouncements of Vitoria, Soto, Las Casas, and Acosta are important not only for their direct influence in the Spanish conquest and the colonization of Latin American ecosystems. In addition, they introduced a number of key legal arguments and conceptualizations—some still in an embryonic form—that were further elaborated in the law of nations during the seventeenth and eighteenth centuries, thus having a remarkable influence on later thinkers. They linked the concept of dominium rerum, which Vitoria and Soto elaborated, for example, to humans’ paramount place in God’s creation and their right to private property over the natural realm. This is visible in the works of posterior natural lawyers such as Grotius, Pufendorf, Locke, and Vattel.

The pronouncements of Vitoria, Soto, Las Casas, and Acosta provided theoretical foundation for legal theories that, in the seventeenth and eighteenth centuries and in the context of a growing imperialist impetus, sought to comprehend and control non-European peoples and ecosystems in settler frontiers. For better or worse, the emergence and consolidation of the law of nations and international law, and the treatment of non-European populations during the colonial era, are testament to the long shadows cast by Vitoria and Las Casas.

Examination of the doctrines of Vitoria and Las Casas has traditionally oscillated between categorizing them as accomplices of colonialism or alternatively praising their altruism and cosmopolitanism. These positions miss the point that even if Vitoria and Las Casas had a sincere desire to protect Latin Americans from the ills of conquest, their defense ultimately fell prey to the bias in the religious logic and conceptual categories that inspired their arguments. Ironically, the bias that universalism imbued in their ideologies ended up undermining the very population that the Spanish scholars truly aimed to protect. By separating the motivations of Vitoria and Las Casas from the ideology in which they found expression, one is able to remain critical while avoiding the pitfalls of personal blame.

The universalization of hegemonic economic practices and cultural categories during the age of Spanish imperialism is of foremost significance not only for its historical relevance but also because parts of the conceptual framework they helped to construct are still with us today. Private property and free trade are still the cornerstone of the contemporary neo-liberal global economic order that many call globalization.
Despite the great divergences between these periods, it is still possible to affirm that, embedded in particular international legal doctrines, both periods have naturalized rather contested visions of the good life, with detrimental effects in the social and environmental spheres. The process of global ideological and legal homogenization, which started with the conquest of Latin America and continues in a rather different guise in our own times, has created as many opportunities for cooperation as for exclusion and coercion. Economic power has largely flexed its muscles, contributing to the fact that (more often than not) the features of exclusion and coercion currently shape the life of the largest part of humanity. It is partly because of the urgency of the present that knowledge of the past can be useful for understanding the historical roots of oppressive agendas that have contributed to and continue to produce—if inadvertently—rampant human suffering and widespread environmental damage.
To bring light to those in darkness and also to get rich, which is what all of us men commonly seek.¹

The Spanish colonization of Latin American set in motion a process of environmental transformation. Spaniards appropriated Latin American natural resources in order to extract profits. Therefore, it is possible to argue that Latin American nature was also colonized as result of the conquest of America. Analytically, this colonization had two dimensions. On the one hand, a material dimension facilitated the factual extension of Spanish power over Latin American natural habitats. On the other hand, Latin Americans’ use of ecosystems was conceptualized through the perception of Spanish commentators. Certain uses of natural habitats—those of the Spaniards—were judged as more progressive than alternative uses by Latin American peoples, hence justifying the preponderant access of the colonists to the natural resources of the continent. In this sense, Latin American nature was also conceptually appropriated.

This chapter is devoted to an examination of the first of these two aspects: the material appropriation of Latin American nature. Spanish scholastics, namely Vitoria and Soto, helped in developing an economic vocabulary of private power that allowed for that appropriation. This development and its ecological implication will be the focus of the present analysis. I will examine the arguments of these two authors in conjunction, as, despite nuances, there was a general agreement between them around certain legal questions that have important environmental implications. They agreed on the main economic rights that Spaniards could enjoy in Latin America. Besides, they shared a common religious understanding of the human relationship with nature.

The exploitation of Latin American natural wealth helped in fulfilling Spanish economic ambitions of rapid enrichment in the colonies. Exploitation became possible thanks to a series of legal mechanisms whereby elements of the natural environment could be separated from the ecosystems to which they were part and transformed into merchantable commodities. In Vitoria’s lecture *De indis*, the legal institutions that legitimized the material appropriation of Latin American nature were given the status of natural rights. The universal conceptual grounding of those rights provided them with a solid intellectual foundation. In addition, their inclusion as part of the *ius gentium* gave them universal application and, hence, global reach. From an environmental perspective, the most important of the natural rights that Vitoria recognized as part of the *ius gentium* were the right to private property, intercontinental trade, and the so-called *law ferae bestiae*, the old Roman relative of the doctrine of occupation.

Important as these rights were for the appropriation of Latin American ecosystems, it is still difficult to imagine how their mere existence and recognition could foster an exploitative environmental approach. After all, the pre-colonial populations of Latin America had appropriated and traded elements of Latin American ecosystems for millennia. The rights that Vitoria acknowledged as applicable to the Latin American context helped the localized destruction of nature only because they functioned in a wider imperial socio-economic context in which Spanish power was linked to the worldwide exploitation of natural wealth. What is more, apart from enhancing the economic power of the Spanish Crown, the rights to private property, trade, and occupation operated within a particular understanding of the relationship between humans and nature in Latin America derived from a specific Christian conception of the boundary between the natural and social spheres. The preeminence of the latter over the former created the ideological space in which Spanish economic rights over Latin American ecosystems could be exercised without the sense that one ought to be concerned about the destruction of nature.

In order to examine the past without falling into presentism and anachronism, it is of foremost importance to bear in mind from the outset that the way in which we look at nature today is radically different from Vitoria and Soto. Our world and that of the Spanish scholastics are incommensurable. As Ileana Porras reminds us, concepts like ecosystems, ecology, and sustainability, among others, have novel currency and affect our perceptions and the implications we draw from the world.² Vitoria and Soto looked at nature in a completely different way than we do today. They understood nature primarily through their religious lenses. Today, rid of a religious understanding of the natural world, many of us

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wear different ones. So again, the point of analysis of Vitoria’s and Soto’s ideas is not to pass judgment upon them, but rather to examine the type of glasses they wore in order to ascertain the historical and current implications of the power attached to certain ideas and worldviews. This effort will not be in vain if we become aware of certain parallels between the types of ideological glasses they wore and the ones we currently wear.

_Spanish conquest and the Duda Indiana_

The Spanish conquest of Latin America is one of the most destructive episodes in human history. The combination of Spanish germs and violent conquest brought about a population collapse of unprecedented proportions. The decay of the Latin American population was a swift phenomenon. One and a half centuries after Columbus’ first voyage, the pre-colonial population was reduced to 10 percent of its original figure. In other words, tens of millions of individuals perished. Witnessing the destruction of the very population they were supposed to convert, members of the Dominican order began to question the way in which Spanish colonization was being carried out. In particular, the brutality with which the Spanish undertook the conquest of the Taíno population of the island of Hispaniola (the first territory to concentrate the attention of Spanish conquistadores) was exposed and denounced by the first Dominicans that arrived on the island. The Taíno were completely annihilated. If Spanish conquest proceeded the same way, the evangelizing mission was clearly in jeopardy.

One of the main issues of contention was the imposition of a semi-feudal order through the establishment of a forced labor system, the _repartimiento_, which was later substituted by a similar

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3 The reasons for population collapse were manifold. Several of the causes of death, like harsh labor, disruption of previous system of production, displacement of male adults for work, and allocation of women for the newcomers are attributable to the destructiveness of the conquistadores. However, the main reason was disease. But its enormous impact can only be correctly explained in conjunction with conquest. Germs were so devastating because they affected an already weakened society in which the normal mechanisms for demographic recovery were no longer in place. See George Raudzens, ‘Outfighting or Outpopulating? Main Reasons for Early Colonial Conquest, 1493-1788’ in George Raudzens (ed.), _Technology, Disease and Colonial Conquest, Sixteenth to Eighteenth Centuries: Essays Reappraising the Guns and Germs Theories_ (Leiden, Brill, 2001) 31-57, 36-39. See also Massimo Livi Bacci, _Conquest: The Destruction of the American Indios_ (Cambridge, Polity Press, 2008) and Elliott, _Empires_, 59-63. A concrete example of the lethal effect of mines on workers’ health in colonial Latin America can be found in Kendall W. Brown, ‘Workers’ Health and Colonial Mercury Mining at Huancavelica, Peru’ _The Americas_ (2001) 467-496.

4 Matthew Restall, _Seven Myths of the Spanish Conquest_ (New York, Oxford University Press, 2003) 141. Importantly, germs travelled faster than conquerors, so in many areas the Latin American population was declining even before direct contact with the Spaniards.
institution called the *encomienda*. In fact, the spark that ignited the first reaction against the mistreatment of Latin American peoples originated precisely as a denunciation of that system of labor on the island of Hispaniola. On the 21st and 28th of December 1511, on the island of Hispaniola, Fray Antonio de Montesinos (1475-1540) took the crowd that assisted to mass by storm. He ascended to the pulpit of the church and delivered a diatribe to the conquistadores that was to shake the foundations of the Spanish Empire in Latin America for the first time. In his sermons, Montesinos unmasked the greed and ruthlessness of the *encomenderos* who, he held, were using Latin Americans for their own economic benefit, paying scant attention to their well-being and religious instruction. Montesinos’ denunciation aroused a fierce reaction in Hispaniola. His accusation that the conquistadores were in mortal sin planted the first seeds of the *duda Indiana*, the doubts of conscience about the goodness and morality of Spanish colonialism. There was nothing more frightening for the ruthless catholic colonists than the threat of eternal damnation. Soon the controversy reached the royal court in Spain. The legitimacy of the Spanish colonial enterprise in Latin America was at stake and, hence, the Spanish King took special interest in the question, spurring a long-lasting debate.

From the outset, the law was an essential element of the Spanish expansion in Latin America. Upon setting foot on the continent, Columbus celebrated a legal ritual whereby he took possession of the lands discovered in the name of the Queen and King. The relevance of the legal form was reflected in the fact that Columbus’ first expedition included a public notary (*escriba*) but not a priest. Securing rights over the newly acquired Latin American lands was not a concern exclusive to the Spaniards. Other colonial powers such as the Dutch, the English, the French, and the Portuguese celebrated different kinds of rituals by which they claimed a right over Latin American land as a way of initiating colonial authority.

The Latin American colonial acquisitions of the Crown of Spain were, from the outset, shielded against European colonial rivals. In 1493, one year after Columbus voyage to Latin America, the Pope Alexandre IV issued a series of Bulls—*Inter caetera I, Inter caetera II, Eximiae devotionis*—in which he donated in perpetuity all Latin American territories to the Spanish Crown in exchange for

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5 The *repartimiento* was the first denomination of the forced labor system that allocated Latin Americans as workers to the Spanish conquerors. Whereas the *repartimiento* originated in Hispaniola under the control of Fray Nicolás de Ovando, a royal official, and was later extended to other Caribbean islands, the *encomienda* appeared once the Spanish started the inland conquest of Latin America, becoming institutionalized during the conquest of Mexico under the leadership of Hernan Cortés. See Jonathan C. Brown, *Latin America: A Social History of the Colonial Period* (Belmont, Thomson Wadsworth, 2005) 84-95.


According to the power conferred by the Pope in the Bull *Inter caetera II*, the Spanish Crown was the owner of all the water and land west of the meridian, situated 100 leagues west of the islands of *Cabo verde* and the Azores. Not satisfied with the unilateral line decreed by the Pope, the Crown of Portugal initiated negotiations with Spain in order to demarcate their mutual spheres of influence in Latin America. On 7 June 1494, they signed the Treaty of Tordesillas, which resolved colonial tensions between the two naval powers. In the treaty, the line of demarcation of Spanish power in Latin America was moved from 100 to 370 leagues west of the island of *Cabo Verde*. The east of that line comprised the eastern part of what is today Brazil. The inclusion of that territory within a Portuguese sphere of influence lay the foundation for the Portuguese Empire in Latin America.

The external legitimacy of Spanish colonial power, however, did not resolve the thorny question of what to do with the myriad polities the Spanish had come across in their inroads in Latin America. What was the right treatment of the new Spanish subjects? Moreover, what was the legal ground whereby Spanish power could be legitimately exercised in Latin America? In order to resolve these questions, Ferdinand, the Spanish monarch, summoned a commission of theologians and officials. One result of these early deliberations about the ethic of the conquest was the promulgation of the *Leyes de Burgos* in 1512, which legalized and regulated the system of forced labor whereby Spanish masters subjected Latin American peoples. These laws were, however, insufficient to settle the controversy surrounding Spanish conquest. While they provided legal certainty to the internal social and economic life of the new Spanish territories, they still did not say anything about the just basis for the wars of conquest.

After Montesinos’ accusatory speech, Ferdinand was aware of the urgent need for finding a formula that would specify the legal basis for the Spanish ‘wars of pacification’. So, a group of theologians gathered at the monastery of San Pablo in 1513 and came up with a doctrine that was translated into legal terms by the royal jurist Juan López de Palacios Rubios. The purpose of this pronouncement—the *requerimiento*—was to appease the doubts of conscience that could be generated by the subjugation or even killing of Latin Americans. The *requerimiento* was, basically, an ultimatum, compelling Latin

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9 Ibid.
10 Ibid.
Americans to accept Spanish sovereignty, surrender to the power of its King and the Pope, and accept the preaching of the gospel. Abiding by these terms guaranteed protection and a lack of compulsion to convert to the new faith. Their rejection was interpreted as a declaration of war, which in the event of defeat justified enslavement and dispossession of the Latin Americans’ property.

This ritual, performed in front of people who could not even understand its meaning, evidenced the bias of the Spanish legal process, as it forced Latin Americans to decide between given alternatives, foreclosing the possibility of an equitable dialogue.\textsuperscript{13} Due to these shortcomings, Spanish theologians and intellectuals soon disputed the suitability and legal validity of the \textit{requerimiento}.\textsuperscript{14} This controversy was part of a broader debate about the just title of Spanish colonial possessions in Latin America and the legitimacy of war.\textsuperscript{15} Besides the short-term effects of Montesinos’ courageous campaign, his sermons inaugurated a long-lasting and humane line of argumentation about Latin American affairs.\textsuperscript{16} Inspired by his brave Dominican colleague and ever conscious of what was at stake in terms of power for his own order\textsuperscript{17} and the church at large, other Dominican friars like Francisco Vitoria and Bartolome de Las Casas engaged in the defense of Latin Americans, affirming their freedom, status, and even their capacity to hold property.

The advocacy of some members of the Dominican order can be portrayed.\textsuperscript{18} Without denying a real preoccupation for the Latin Americans’ wellbeing, an alternative view underscores the complex power struggle that stemmed from the attempt to control the colonization process. In this context, the different agendas of the Church, the conquistadores, and the Spanish Crown in Latin America intertwined, converged, and collided. More often than not, the interest of the monarchy in checking the growing influence of the conquistadores aligned with the desire of the religious orders to guarantee the ethical character of the Catholic presence in Latin America while increasing their own niche of power in the new colonial society, often in competition with other religious orders.\textsuperscript{19}

\begin{footnotesize}
\begin{enumerate}
\item Greenblatt, \textit{Marvelous Possessions}, 59. Seeds convincingly argues that the \textit{Requirimiento} did ‘not intend to be internally persuasive (as in a consensual relationship)—but only to obtain an external compliance’. See Seed, \textit{Ceremonies}, 98.
\item Ibid., 95.
\item Helen Rawlings, \textit{Church, Religion and Society in Early Modern Spain} (New York, Palgrave, 2002) 102.
\item Ibid.
\item For Seed the most vocal position adopted by the Dominican Order with regard to the poor treatment of the Latin American population can be explained by the desire to challenge the Franciscan religious monopoly in Latin America. See Patricia Seed, “‘Are These Not Also Men?’: The Indians’ Humanity and Capacity for Civilization’ 25 \textit{Journal of Latin American Studies} (1993) 629-652, 634.
\item This is the line of thinking famously defended in Hanke, \textit{The Spanish Struggle}.
\item The clash between Crown and colonists is described in Elliott, \textit{Empires}, 117-152. Their struggle for land rights is described in Anthony Pagden, \textit{Lords of all the World: Ideologies of Empire in Spain, Britain and France c. 1500-c. 1800} (London, Yale University Press, 1995) 92. The argument of an alliance between Spanish friars and monarchy can be found in Daniel Castro,
\end{enumerate}
\end{footnotesize}
The destructiveness of the conquistadores compromised the mission to convert Latin America peoples to the Catholic creed. How could religious orders and the Dominicans in particular spread the gospel if the population to evangelize was speedily disappearing or so utterly afraid that it fled in their presence? Moreover, was it convenient that the reported atrocities of Catholic colonists were associated with the designs of the Emperor and the Pope for the newly ‘discovered’ lands and peoples? The reputation of Catholic Spain in Europe and for that matter of the whole Christendom was at stake at a crucial moment for the future of the Church. Therefore, the Dominicans understood the urgency of finding an alternative and more benign way of fulfilling Spanish economic, political, and religious interests in Latin America. That way, they could resolve the thorny *duda Indiana* about the morality and legality of Spanish imperialism. This was the context in which Francisco Vitoria dictated two of his most famous theological lectures—*De indis et De iure belli relectiones*—in which he dealt with the moral and legal aspects of the Spanish conquest.

*Francisco de Vitoria between gentleness and expediency*

Francisco Vitoria is one of the main points of reference for studies of modern international thought and international legal historiography. This privileged place stems from the fact that his scholarship was a response to some of the most important transformations of the early modern world, providing sixteenth century Christianity with a road map to navigate the turbulent waters of an expanding and changing globe.20 He was one of the most important political thinkers of the sixteenth century21 and perhaps the most reputed theologian in Catholic Europe at the time.22 He occupied the Prime Chair of Theology at the University of Salamanca from 1526 to 1546.23 In 1539, he presented his conclusions about the Spanish claim to dominion in the Indies. Even though doubts about the *requerimiento* and the validity of Spanish legal title to Latin America had been around for quite a while, there was scant open discussion of the

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20 See Koskenniemi, ‘Empire’, 12.

21 This is the place awarded in Seed, *Ceremonies*, 98.


issue until the complex civilizations of Anahuac and Tawantinsuyu fell prey to Spanish power. These were advanced societies with enormous, sophisticated, and rich cities. Their destruction and the pillage that went with it did not go unnoticed. Vitoria was particularly concerned about the nefarious way in which Pizarro and his men had proceeded during the conquest of Tawantinsuyu.

In this context, the authoritative voice of Vitoria reopened the debate about the valid titles for Spanish sovereignty in Latin America. According to Pereña, he gave the first scientific response to the ethical and legal doubts on the Spanish conquest—the so-called duda Indiana. In both lectures, Vitoria’s arguments were fashioned in the old scholastic tradition, mixing theology and law. Then, Vitoria’s innovation lay in having answered the question of the legitimacy of the Spanish conquest of Latin America by reference to the ius gentium or the laws and customs shared by all human beings as part of one community.

In the relectio De indis Vitoria examined and systematically rejected seven different legal titles for Spanish Dominion. The first two titles that Vitoria did not recognize as valid were based on the rights of jurisdiction of the Emperor and the Pope in Latin America, which constituted the legal foundations of the requerimiento. Therefore, Vitoria’s conclusions challenged the official position on the legal basis for Spanish colonial rule. After discarding other possible titles like discovery, forced evangelization, Latin Americans’ sins, or even their voluntary acceptance of Spanish rule, he moved from a divine to a secular law ius gentium, which he described as that which natural reason prescribed to all human beings. Under ius gentium, the Spaniards had a set of rights in Latin America that entitled them to travel, sojourn, trade, participate in the commons, be citizens, and preach and proclaim the gospel.

25 Ibid., 69-70.
29 Soto also denied that the Pope and the Emperor were Lords of the whole world. See Domingo de Soto, Relección ‘De Dominio’, edición crítica y traducción, con introducción, apéndices e indices porJaime Brufau Prats (Granada, Universidad de Granada, 1964) §27-33 135-163.
30 It was then natural that Charles V might have interpreted Vitoria’s lecture as a challenge to his authority. Therefore, in November 1539 the Emperor protested to the prior of the Dominican monastery of San Esteban where Vitoria resided. See Luis Frayle Delgado, Pensamiento Humanista de Francisco Vitoria (Salamanca, San Esteban, 2004) 42-43.
At first sight, Vitoria’s system of reciprocal and universal rights seems perfectly objective. Closer scrutiny reveals, however, that his arguments were imbued with Spanish religious and cultural categories.\(^{31}\) Reciprocity disappeared when in the third part of his lecture Vitoria referred to evangelization, tyranny, free acceptance of Spanish rule and Latin Americans’—doubtful—incapacity. All these bases for Spanish title operated unilaterally. It was inconceivable that the Latin Americans could preach to the Spaniards, that the later voluntarily accepted Latin American dominion, or that the Spanish political and legal institutions could be lacking or could result in tyranny.\(^{32}\) In his apparently reciprocal system, the conviction of Spanish superiority informed the legal status of Latin American peoples.\(^{33}\)

His bias notwithstanding, in theory, the Spanish rights recognized by Vitoria could have still been justly applied, that means, enjoyed without damage being inflicted to the pre-colonial population. So, in order to form a complete picture of his doctrine, we still need to examine the guarantees he designed to protect the Latin Americans from Spanish encroachment, or what has been called his thin ‘conception of justice’.\(^{34}\) In this sense, it is fair to acknowledge that Vitoria denounced the conquistadores’ massacres, plundering, and capture of Latin American Princesses.\(^{35}\)

Vitoria also insisted that the enjoyment of Spanish rights was subordinate to the wellbeing of the Latin Americans. Spaniards ought to use persuasion at all costs. He even affirmed that a war could be just for both sides when ‘there is right on one side and ignorance on the other’.\(^{36}\) Vitoria’s insistence on gentle behavior reveals a sincere concern about the fate of the Latin Americans.\(^{37}\) However, gentleness coexisted with expediency, creating legal grounds for Spanish commercial and political power.\(^{38}\) The right to evangelize further expanded Spanish authority, providing a definite legal rationale for

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\(^{34}\) This is the expression used in Georg Cavallar, ‘Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?’ 10 *Journal of the History of International Law* (2008) 181-209, 188-190.


\(^{36}\) Vitoria, ‘On the American Indians’, 3.1 §6 282.


\(^{38}\) For Anghie, the notions of equality and reciprocity in Vitoria’s thinking fade away when confronted with the harsh realities of Spanish colonization. Once Vitoria’s arguments are contextualized, they become justifications for Spanish rule. Anghie, *Imperialism*, 21.
domination. The final guarantor of the legal system was the use of force. For Vitoria, war was justified in cases were hostile attitudes against the Spaniards persisted, impeding the fulfilment of their rights.39

There is a pervasive tension in Vitoria’s lecture between his conviction that the Spanish conquest had to be carried out in a civilized manner and his endorsement of the colonial enterprise. Vitoria did not hesitate to denounce Spanish violent conquest of Tawantinsuyu—even vehemently, in his letter to Miguel de Arcos.40 At the same time, he never challenged the legitimacy of Spanish presence per se. Thus, he stated: ‘I myself have no doubt that force and arms were necessary for the Spaniards to continue in those parts; my fear is the affair may have gone beyond the permissible bounds of justice and religion.’41 Vitoria adopted a middle ground with regard to the justice of Spanish colonization. This is evident in his affirmation, at the beginning of De indis, that the matter of the barbarians ‘is neither so evidently unjust of itself that one may not question whether it is just, nor so evidently just that one may not wonder whether it might be unjust’.42

The accommodation of divergent elements in the agendas of the Spanish Crown and his religious order with respect to the conquest of Latin America generated a subtle ambivalence in his relectio that was also manifest in his treatment of Latin American mores.43 In order to show that Latin Americans were not natural slaves he had to demonstrate that they had rationality and exercised self-government. The status of natural slaves would have prevented their having dominium (both private and public) over their territories, thus rendering ius gentium inapplicable to the situation. So, when Vitoria examined the rational capacity of the peoples of Latin America and their social achievements, he famously concluded that:

They are not in point of fact madmen, but have judgment like other men. This is self-evident, because they have some order (ordo) in their affairs: they have properly organized cities, proper marriages, magistrates and overlords (domini), laws, industries, and commerce, all of which require the use of reason...44

Yet, when at the end of his lecture he considered a final title for Spanish dominion based on the Latin Americans’ incapacity for self-government derived from their alleged lack of intelligence, Vitoria stated

40 See Cavalllar, ‘Vitoria’, 191. See also supra footnote 35.
41 Vitoria, ‘On the American Indian’, 3.2 §12 286.
42 Ibid., intro. §3 237.
43 For a similar view on Vitoria’s ambiguity see Lupher, Romans, 81.
44 Ibid., 1.6 §23 250.
that he did ‘not dare to affirm or condemn it out of hand’.\footnote{Ibid., 3.8 §18 290.} A proof of the supposed child-like nature of Latin American peoples was the fact that they did not have proper laws, magistrates, and manufactures.\footnote{Ibid.} Consequently, they had to be placed under the tutelage of the Spanish crown.\footnote{Ibid.} In account of his previous affirmation, Vitoria’s sudden hesitation about the nature of Latin Americans’ polities seems contradictory.\footnote{In order to help them, the Crown would administer their territories and appoint ‘prefects and governors for their towns’. Ibid.}

Vitoria’s safeguards for the Latin Americans remained also detached from the context of Latin American conquest.\footnote{I will offer an answer to Vitoria’s ambivalence in Chapter 3, pages 115 to 118.} He wrote his lecture after forty years of Spanish colonial presence in the continent. The gap between his doctrines and the unkind reality of conquest left the Latin Americans in a Catch 22. Their survival rested upon opposing the Spanish by all necessary means. However, that sort of resistance was precisely what the doctrines of Vitoria outlawed. Although this limitation applied only to cases where the Spanish did not harm the natives, this prevention was unrealistic. Columbus treated the Taínos of Hispaniola rather well before wiping them out, and Cortes and Pizarro displayed good manners as part of their strategy to conquer great empires. Waiting to resist gave the Spaniards comparative advantage and reduced the already limited space for maneuver that the Latin Americans had.\footnote{The same opinion can be found in Schmitt, The Nomos, 109. Vitoria’s failure cannot be attributed to ignorance, as the Dominicans received detailed reports of what was happening in Latin America. See James Brown Scott, The Spanish Origin of International Law (Oxford, Oxford University Press, 1934) 77.} As Greenblatt puts it: ‘Words in the New World seem always to be trailing after events that pursue a terrible logic quite other than the fragile meanings that they construct.’\footnote{Stephen Greenblatt, Marvelous Possessions, 63.}

Vitoria’s distance from what was going on in Latin America disappeared at the end of his lecture when he inquired on the consequences of his doctrines on the Spanish titles. In the hypothetical case that Latin Americans had given the Spanish a friendly treatment or justly defended themselves, Spanish inroads in Latin America would have become illegitimate. This state of affairs would have challenged the viability of the Spanish Empire in Latin America. In view of this possibility, and with a remarkable awareness of the need to offer some grounds for Spanish rule to the Emperor, Vitoria affirmed ‘that it is clear that once
a large number of barbarians have been converted, it would be neither expedient nor lawful for our prince to abandon altogether the administration of those territories. In this retroactive justification of Spanish power, Vitoria remained sensitive to the reality on the ground, offering the Spanish crown a legitimization of its rule based on concrete historical deeds. In the search for expediency, justice was undermined, as he seemed to have forgotten the threshold of protection so firmly upheld before. His words evidence that he took evangelization for granted without distinguishing whether conversion was the product of a spontaneous and peaceful process or a result of the use of force.

A final important aspect of Vitoria’s work relates to the Eurocentric character of the cultural milieu of the debate about the colonization of Latin America. Vitoria, as almost all his contemporaries, was completely indifferent to the lack of Latin American agency in the formulation of the legal theories that were to govern their relationship with the Spaniards. Their legal status depended, inter alia, on the rational arguments articulated by a single scholar, whose doctrines displaced the will of the approximately 2,000 social groups that existed in Latin America at the time. Vitoria, as with the overwhelming majority of the participants in the conquest of Latin America, suffered from the malady of Columbus who had ‘… discovered Latin America, but not the Americans’.

The absence of Latin Americans will also operated within Vitoria’s system. Intervention against tyrannical rules overrode Latin Americans’ consent to those practices. Likewise, in the name of a large portion of Latin American converts—even if conversion was unlawfully obtained, as ‘by threats, terror or other impermissible means’—the Pope could replace their sovereign with a Christian one, and could do so unilaterally without the request of the Latin Americans. Finally yet importantly, all sources used by Vitoria belonged to the Western tradition. There was no room in the ius gentium for Latin Americans’ interpretation of their own social, political, legal, cultural, or economic institutions.

52 Vitoria, ‘On the American Indians’, 3.8 §18 292. There is a genuine concern in Vitoria’s remark regarding Latin American converts. However, his preoccupation stemmed from their condition of Christians rather than their Latin American origin.
53 Todorov, The Conquest of America, 49.
55 Ibid., 3.4 §14 287.
56 Williams, The American Indian, 101.
Privatizing and commodifying Latin American nature: dominium rerum and trade

The figure of Vitoria has been particularly relevant for recent critical studies on the history of international law.\textsuperscript{57} Placing Vitoria in a colonial context, these works have shed light on how his legal doctrines facilitated Spanish political and economic power in Latin America. The previous section built on those previous critical works. My intention in this section is to continue this line of inquiry, albeit from a novel perspective, by exploring the other side of the coin of Spanish economic hegemony in Latin America: its power to redefine Latin American nature and transform its use.

Apart from subjecting several Latin American societies to Spanish rule, Spanish colonization set in motion a process of environmental change.\textsuperscript{58} Therefore, Vitoria’s theories need to be re-examined from this perspective in order to determine their environmental ramifications. To that end, I will also consider the doctrines of Domingo de Soto in conjunction with Vitoria’s, as the former’s conception of dominium can shed light on the latter’s views. It is my contention that an often overlooked but important consequence of Vitoria’s arguments in his \textit{relectio De indis} was the possibility of appropriating Latin American ecosystems for personal enrichment. The Spanish right to war indirectly led to this result, as in the case of defeat it was legitimate to dispossess Latin Americans of their land and natural resources.\textsuperscript{59} This notwithstanding, the appropriation of Latin American natural resources was also directly legitimized by the natural rights discourse that Vitoria elaborated as part of \textit{ius gentium}. Vitoria’s articulation of a series of natural economic rights provided the Spanish with the legal vocabulary through which they could apprehend Latin American natural resources, trade them across the Atlantic, and transform them into wealth.

Vitoria opened his \textit{relectio} by enquiring whether before the arrival of the Spaniards ‘these barbarians … had true dominion, public and private’.\textsuperscript{60} His purpose was to determine ‘whether they were true masters of their private chattels and possessions, and whether there existed among them any men who were true princes and masters of the others’.\textsuperscript{61} Vitoria took into account the economic and political power of Latin American peoples. In order to protect the Latin American population against the conquistadores it was not only important to ascertain whether the peoples of Latin America enjoyed private property

\textsuperscript{58} See \textit{supra} Chapter 1, pages 29-35.
\textsuperscript{59} Vitoria, ‘On the American Indians’, 3.1 §8 283.
\textsuperscript{60} Ibid., 1.1 §4 239.
\textsuperscript{61} Ibid.
rights but also whether they were the true lords of their own domains. Of these two questions (sovereignty and property), the issue of ownership is the most relevant for the analysis of the environmental implications of Vitoria’s thinking.

With regard to ownership, Vitoria’s query established from the outset the legal foundations for all the ulterior discussion on the possible just titles whereby ‘we Christians were empowered to take possession of their territory’. So, while formulating the problematic he wanted to resolve, he already chose the legal angle from which to look at the matter. He could have alternatively posed the question of how Latin Americans related to their possessions: did they, for instance, have a legal regime of common or private property or a mixed system? This question may sound anachronistic, but we know that in Columbus’ first letter from Latin America the Admiral had stated that ‘he could not well understand whether’ the inhabitants of Latin America ‘had private property, or not’. Palacios Rubios had also written that they had no private property and that they farmed in common the few lands they cultivated. However, Vitoria’s query presumed that *dominium rerum* was the institutional arrangement that represented the way in which the inhabitants of Latin America related to their territories.

By a simple question, Vitoria had fit Latin Americans’ commonwealths in the legal mold that was in line with his and his contemporaries’ worldview and their conception of the human relationship to the material world. His understanding of *dominium rerum* as a private power over material reality was based on a particular notion of ownership and use of land that (once universalized) was applied to the Latin American continent in disregard of the alternative ways in which its inhabitants may have related to nature. Regardless of Vitoria’s intent and political project, his neglect of the way in which Latin Americans related to the land can largely be explained by contextual and structural conditions, such as

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64 The First Letter of Christopher Columbus to the Noble Lord Raphael Sanchez Announcing the Discovery of America, reproduced in fac-simile from the copy of the Latin Version of 1493 with a new introduction (Boston, Published by the Trustees, 1891) 13.
the Eurocentric perspective from which the debate about the rights of Latin American peoples was conducted.

The increase of human power over the environment that the universalization of private property entailed is illustrated by Soto’s definition of *dominium* in his *De iustitia et iure* in contradistinction to other types of power over nature. ‘*Dominium*’, he asserted, ‘is to be distinguished from possession, use or usufruct … for *dominium* is not simply the ability to use something and take its produce, but to alienate it, give it away, sell it or neglect it.’68 The law was the only limitation to the amplified power that the owner had over his/her property.69 Similarly, Vitoria maintained that ‘wild beasts and all irrational beings are subject to the power of man’.70

Vitoria’s and Soto’s understanding of the process of formation of private property rights was related to their religious beliefs. According to Vitoria, God had conferred the world to humanity as a whole.71 Soto cited Genesis 1 to prove the original regime of common property.72 Vitoria argued that under natural law things remained common during the ‘natural state’, the historical period that spanned from Creation to the original sin.73 After the Fall, and due to the fact that natural law did not prescribe but just recommended common ownership, things were privately divided through human law74 by consensus.75 This type of agreement had three important features. First, it could be imposed on a minority because, according to natural law, what the majority decided was the rule.76 Second, it was virtual, in the sense that everyone could take for its own use what had not been already taken.77 Finally, in order to have universal validity this virtual consensus was recognized as part of *ius gentium*.78 So, *ius gentium* was of foremost importance for the process of privatization of the world’s natural resources that had remained common before the Fall.79

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69 Ibid.  
70 Vitoria, ‘On the American Indians’, 1.4 §20 248.  
73 ‘A principio mundi omnia erant communia’ (at the beginning of the World everything was common); in Vitoria, *De iustitia*, q62, a1, n9, p. 67 as quoted in López, ‘Propiedad y Dominio’, 83. [translated by author]  
74 Ibid., q62, a1, n20, p. 75.  
75 Koskenniemi has footnoted that by ‘a distinction between binding and merely recommendatory provisions of natural law’ Vitoria presented the character of the *divisio rerum* ‘in terms of private property’. See Koskenniemi, ‘Empire’, 14.  
76 For Vitoria, this was a way of maintaining peace. Ibid., q62, a1, n22, p. 79.  
77 Ibid., q62, a1, n23, p. 79.  
78 Ibid. See also Soto, *De iustitia*, Book IV, 3.1, 297.  
79 Brett contends that the division of *dominia* was for Vitoria and Soto the main distinction between *ius gentium* and natural law. See Brett, *Changes*, 197.
For the Spanish scholastics, this religious narrative was not a metaphor, but a description of reality. The expulsion from paradise marked the beginning of the world, as they understood it. Once Vitoria accepted the institution of private property as the way of dividing the world that God had given to humanity in common, and once it became universally applicable by virtue of *ius gentium*, it acquired providential historical force and a totalizing geographical ambit difficult to resist.

Vitoria and Soto’s treatment of *dominium* as control and power over material reality was at odds with the Latin Americans’ complex and diverse conceptions of nature. This concept transformed their bond—with the lands they cultivated, the minerals with which they crafted handicrafts and jewelry, the trees they used for timber and construction, the animals they hunted, etc.—into a material relationship between subject and object, owner and owned. The former term of these opposites was active and related to the latter in terms of superiority. Conceptualized through the specific vocabulary of the *ius gentium*, nature became a mere material entity to be possessed. This particular understanding of nature stripped it of religious and cultural readings that were significant to Latin American peoples. The idea of ownership reduced the content of Latin Americans’ relationship to their territories to a simplified economic version of what had previously been, while the institution of private property altered the form of that relationship to suit private interests. This paradigmatic shift toward the privatization of natural resources did not *per se* lead to environmental exploitation, but it furnished the legal apparatus that made it possible.

In his inquisition on possible grounds for denying Latin American peoples the status of proprietors, Vitoria first dismissed allegations of sinfulness and their status as non-believers. Likewise, he then rebutted accusations of irrationality as unfounded. The proof was that their cultures were somehow developed. Accordingly, he concluded that ‘the barbarians undoubtedly possessed as true dominion, both public and private, as any Christians’. Soto was of the same opinion, namely, that Latin Americans had rights of jurisdiction and property over their territories. Vitoria was well aware of the threat that a

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80 Vitoria argues that ‘we do not speak of anyone being the “owner” of a thing (*dominium esse*) unless that thing lies within his control’. Vitoria, ‘On the American Indians’, 1.4 §20 248. For Soto’s view see supra footnotes 69 and 70.
81 See López, ‘Propiedad y Dominio’, 82.
83 See Vitoria, ‘On the American Indians’, 1.2-1.3 240-246.
84 Ibid., 1.4 §20 247-248.
85 Ibid., 1.6 §22 250.
86 Ibid., 1.6-concl. §23 250.
87 Soto, *De Dominio*, §34 164.
contrary conclusion would have posed to the wellbeing of the Latin Americans and the survival of the very population his Dominican order so fervently wanted to convert. His conclusion prevented Latin American colonization from being conducted in an unruly fashion. Anarchy suited the avid conquistadores but hindered peaceful evangelization. The legal certitude of Latin Americans’ right to property was a guarantee against the despoliation of the greedy conquerors, which Vitoria deplored. As far as he was concerned, Spanish ‘men’ were no longer to operate in a legal vacuum of impunity in Latin America.

Besides, Vitoria was aware of the theoretical correlation between Latin Americans’ rationality, their having dominium, and the applicability of ius gentium. After all, property was one of the institutions that ‘learned men’ and royal lawyers for that matter most commonly associated with the presence of a civil society.88 Had he found Latin Americans irrational they could have not had dominium.89 Moreover, without the capacity to hold property there was no chance of a political life and, hence, legal protection against ‘invaders attempting to seize their lands’.90 If that was the case Vitoria could not have resolved the ‘Indian question’ by recourse to ius gentium, which in the face of the Lutheran challenge to the power of the Pope and the Emperor, provided a timely and universally valid legitimization of the Spanish presence in Latin America.91 It offered as well the possibility of peaceful evangelization, avoiding Lutheran charges against a corrupted and decadent imperialist Catholicism imposed by force.

Rationality and private property were the lynchpins over which Vitoria would later in his lecture build his arguments regarding ius gentium. Sanctioned by ius gentium, private property acquired universality and defined in retrospective the way Latin Americans related to their territories before the arrival of the Spaniards.92

Having found that Latin Americans owned their territories, Vitoria maintained (in the third part of his relectio) that their right to private property was not absolute. The rights that nations enjoyed under ius gentium could limit it. By reference to ius gentium, he managed to reconcile an initial respect for Latin

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89 Vitoria adhered to Aquinas postulate that only those who can govern their acts could own property. Vitoria, ‘On the American Indians’, 1.4 §20 248.
91 Pagden suggests that ‘Vitoria and his successors were far less concerned with the particulars of the American case than they were with the opportunities it provided for the refutation of Lutheran and, later, Calvinist theories of sovereignty’. Ibid., 163.
Americans’ property with the introduction of a series of legal entitlements that would eventually bolster Spanish economic/environmental power in Latin America.

The exceptions to Latin Americans’ ownership that Vitoria recognized were part of a series of rights that governed relations between different commonwealths. Some of those rights, like the rights to travel and sojourn, seemed a priori neutral. 93 As important as these entitlements were, there was still the need for a further right—the right to trade—that would give the Spanish Crown access to Latin America’s wealth. Only the revenues that the Crown expected to derive from the ‘trips of discovery’ could cover the huge military and administrative expenses of keeping afloat the Spanish Empire. For this reason, Vitoria’s right to trade nicely suited Spanish imperial ambitions.

Vitoria elaborated various arguments in order to justify trade. First, he looked at bilateral relations between the Spaniards and the Latin Americans. Based on reciprocity, he held that commerce benefited them both. The latter could import commodities they did not have in exchange for gold and silver. 94 Mutual gain represented a reasonable foundation for international trade. Yet, could Latin Americans understand the value that gold had for the Europeans? Columbus affirmed that gold was a treasure, the possessor of which could impose his will on the world. 95 While acknowledging the exaggeration of this claim, it is true that gold had great value in European and Asian markets during the sixteenth century. Because the Spanish and not the Latin Americans were commercially operating on both sides of the Atlantic, only they could know and capture the value that concrete commodities had for different commonwealths. A language of rights that presumed the parity of both sides obscured this information asymmetry.

Due to the introduction of the right to trade in Vitoria’s ius gentium, European merchants’ profitable and preponderant place as intermediaries between Latin American and European markets received legal sanction. Vitoria was in principle opposed to profits derived from unequal trade because they amounted to the sin of avarice. 96 However, the merchants’ personal enrichment could be acceptable as a way of compensating transportation costs. 97 In other words, personal enrichment was justifiable if it enabled the

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94 Vitoria, ‘On the American Indians’, 3.1 §3 279.


96 See the discussion in Koskenniemi, ‘Empire’, 19-20.

97 Ibid.
development of commerce in cases in which it would have otherwise not been possible. Accordingly, it is unlikely that Vitoria would have condemned capital accumulation, as it was in fact European merchants and their ships that made that intercontinental trade possible in the first place.  

Moving from bilateralism to cosmopolitanism, Vitoria invoked the fellowship of humanity as a further defense of trade. In the naturalist tradition, trade was considered as one of the channels through which human knowledge could be shared between different communities. The absence of trade hampered the establishment of political, economic and cultural ties between different polities. For this reason, Vitoria concluded that ‘the barbarians can no more prohibit Spaniards from carrying on trade with them, than Christians can prohibit other Christians from doing the same’. In addition, Latin American rulers were compelled by the law of nature to love the Spaniards and, hence, they could not ‘prevent them without due cause from furthering their own interests’. This justification of trade encapsulates, perhaps better than any other, the irony of the Spanish conquest. As Martti Koskenniemi has put it, love was ‘often difficult to distinguish from a desire to dominate’. Linked to sentiments of love and fraternity, commerce was internationalized, acquiring a positive cosmopolitan character that would be preserved in the law of nations over the following centuries. Coercion, the fact that trade was imposed on the Latin Americans through the threat or the actual use of force by way of the right to war, remained invisible in Vitoria’s legal theories.

Vitoria’s right to trade exemplifies the shortcomings of the humanitarianism that often permeates the cosmopolitan justifications of universal rules. The general interests of an abstract humanity were invoked as the basis of a right that ignored the particular interests of the concrete millions of humans that inhabited Latin America, whose opinion on the matter became irrelevant as a source of law. Cosmopolitanism cloaked the unequal colonial setting in which economic domination came about. It was actually

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98 For a similar opinion regarding Vitoria’s positive attitudes toward profitable trade, see Porras, ‘Appropriating Nature’ 649.
99 Vitoria was convinced that the fellowship of men was in consonance with natural law. Vitoria, ‘On the American Indians’, 3.1 §3 280.
100 Pagden, The Fall, 77. The social and political value of commercial ties was something that Latin American societies also recognised. See Karen Olsen Bruhns, Ancient South America (Cambridge, Cambridge University Press, 1994) 278.
101 Vitoria, ‘On the American Indians’, 3.1 §3 280.
103 Koskenniemi, ‘Empire’, 11.
104 A similar point is made in Monsieur de Vattel, The Law of Nations or The Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns, from the new edition by Charles Joseph Chitty, with additional notes and references by Edward D. Ingraham (Philadelphia, T. & J. W. Johnson Law Booksellers, 1853) Bk II Ch II §25 144.
Spanish economic rights—dressed as universal—and their monetized market economy that displaced the individual rights of Latin American peoples.105

At least, Vitoria’s defense of free trade seemed to offer a choice of trading partners. According to him, Christian Kings could not deter their subjects (turned merchants) from trading with other nations. However, this small niche of liberty within which Latin Americans could have freely maneuvered clashed with the interest of the Spanish Crown in developing a trade monopoly in Latin America. This forced Vitoria to limit the freedom of commerce he had so firmly upheld before when later in the text he defended Spanish commercial monopoly:

… And since it is the pope’s special business to promote the Gospel throughout the world, if the princes of Spain are in the best position to see to the preaching of the Gospel in those provinces, the pope may entrust the task to them, and deny it to all others. He may restrict not only the right to preach, but also the right to trade there, if this is convenient for the spreading of the Christian religion … Besides, the princes of Spain were the first to undertake the voyages of discovery, at their own expense and under their own banners; and as since they were so fortunate as to discover the New World, it is just that this voyage should be denied, and that they alone should enjoy the fruits of their discovery106

The authority of the Pope was enough to limit Latin American trade only if it was established that a monopoly on commerce was conducive to evangelization. Vitoria knew, of course, that it was in the interest of the Pope to limit the presence in Latin America of those nations that had embraced the Reformation. This could play to the advantage of the Spanish Crown. A trade monopoly authorized by the Pope could be used not only against Protestant nations but also against Catholic rivals. But Vitoria was also aware that the Pope’s power was of no use against nations that no longer recognized his authority. Hence, he complemented the possibility of an exclusive Papal trade concession with the allegation that the burden of colonization had to be compensated by the exclusive enjoyment of eventual benefits. Here, Vitoria was reasoning like an investor. He understood that it was risky to advance

105 For Brown: ‘One of the great changes of the Conquest, particularly within the former Inka Empire, was the introduction of the market system. Previously, the economy had been based on redistribution and reciprocity … the coming of the Spaniards, however, imposed the rule of an external social group with a totally alien economic culture in the form of monetized markets’. See Jonathan C. Brown, Latin America: A Social History of the Colonial Period (Belmont, Thomson Wadsworth, 2005) 205. For an overview of South American systems of exchange before Spanish conquest see Bruhns, Ancient South America, 278-289.

financial resources without the security of returns. Yet he presented the question of Spanish trade monopoly in cosmopolitan terms. It is ironic that he used one of the supreme cosmopolitan ideals—love—to justify free trade, whereas another—justice—served the contrary function of restricting it.

Vitoria’s right to trade was detached from the reality of the Spanish occupation of Latin American territories. From the outset, Spanish violence was a pervasive feature of conquest. Since Columbus and his ‘men’ landed in Hispaniola, they acquired and used the land and its fruits for their own gain and did so by recourse to all available means. The forceful apprehension of Latin American riches continued unabated as colonization intensified, with the full involvement of the Spanish Crown soon afterwards and the defeat of the prosperous Empires of Anahuac and Tawantinsuyu.

Although Latin American peoples were allowed to carry on internal trade, the exchange of the main commodities—spices, gold, silver, and sugar—was under the absolute control of Spain. These goods were exchanged solely between Spaniards, who forcefully appropriated them in Latin America and who gladly received them at home. Consequently, trade entered *ius gentium*, hiding a theft of continental proportions because it was predicated on the exchange between two theoretically equal trading partners. In practice, profitability derived from violent conquest and forceful imposition of Spanish terms. While apparently an exception to the general rule of Latin Americans’ ownership, intercontinental trade allowed a select European elite to control the main international circuits whereby the natural wealth of Latin America was exported to Europe and Asia.

*The law ferae bestiae*

The right to carry on commerce did not exhaust the Spanish economic entitlements sanctioned by *ius gentium*. According to Vitoria, in case the Latin Americans had allowed other foreigners to extract natural resources (like gold inside the earth or pearls in the sea) from their lands, they were automatically compelled to offer the Spanish the same advantage. This sounded paradoxical considering Vitoria’s defense of a trade monopoly. How could Spain justly deny other nations what Latin Americans could not, namely participation in the exploitation of their own wealth? Without the capacity to decide with whom they were going to negotiate the use of their natural resources, Latin Americans’ sovereignty was considerably eroded. What is more, the limitation of Latin Americans’ alternatives operated under the

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dubious premise that they had willingly opened their resources to foreign exploitation to begin with. Again, the context in which Latin Americans’ consent was obtained did not matter.

In spite of its undeniable economic value, the right of participation in the commons assured the Spanish Crown and conquerors only a meagre part of Latin America’s mineral resources. Even if the Portuguese or the French enjoyed certain rights of extraction in Latin Americans’ territories, their value paled in comparison with what—so the Spanish rightly thought—remained unexplored and unoccupied.\textsuperscript{109} So, Vitoria complemented the right of participating in the commons with a right over unoccupied things. He affirmed that goods without owner (here he again mentioned gold and pearls) could be acquired by their first occupier, whatever their location.\textsuperscript{110} This virtual consensus, from which private property stemmed, meant that the whole world had not yet been divided and many natural resources were still vacant, waiting to be occupied. For Spain, this right had a strategic economic value as it gave access to Latin America’s gold and silver with which to finance the costs of empire.

Soto differed from Vitoria on this point, affirming that the Spaniards had no right over Latin American unoccupied gold.\textsuperscript{111} The human race was geographically divided in regions so that the inhabitants of each region had a right over the common things that are within the confines of their particular realm.\textsuperscript{112} Moreover, in his lecture \textit{De dominio} he asserted that ownerless goods belonged to the first occupant only with regard to their use but not their \textit{dominium}.\textsuperscript{113} This meant that even in the case that some of the world’s lands had not yet been divided they could be used but not owned by the first occupant.\textsuperscript{114}

When in his lecture Vitoria introduced the right over unoccupied things, he referred to the law of wild beasts or \textit{ferae bestiae} as enunciated in the Roman \textit{Institutiones} of Justinian. According to this law, ‘wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations’\textsuperscript{115} Based on the examples of the \textit{Institutiones} and Vitoria’s own examples (gold, pearls, and fish) it seems that he was referring only to movable things. However, at the end of his lecture he mentioned again the right of occupation stating that: ‘\textit{Item multa etiam sunt, quae ipsi pro desertis habent velt sunt communia

\textsuperscript{109} El Dorado was the idealised incarnation of that certitude. See Jorge Magasich-Airola & Jean-Marc de Beer, \textit{America Magica: When Renaissance Europe Thought it had Conquered Paradise}, forwarded by David Abulafia, translated by Mónica Sandor (London, Anthem Press, 1994) 69-98.
\textsuperscript{110} Vitoria, ‘On the American Indians’, 3.1 §4 280.
\textsuperscript{111} See Brett, \textit{Changes}, 25.
\textsuperscript{112} Ibid.
\textsuperscript{113} Soto, \textit{De Dominio}, § 21, 121.
\textsuperscript{114} Ibid., §23, 127.
\textsuperscript{115} Ibid.
omnibus volentibus occupare…’\textsuperscript{116} In this passage, it is less clear that he is solely referring to movables.\textsuperscript{117} In principle, there is nothing to suggest that multa could not be interpreted as including immovable property in general, and (deserted) land in particular.

On the one hand, Vitoria could just be referring to movables, as earlier in his lecture he had restricted the Spanish right of occupation to those types of things. Moreover, in his treatise \textit{De iustitia} Vitoria explained that after the divisio rerum, many things remained undivided and, therefore, belonged to the first who occupied them.\textsuperscript{118} He then illustrated this statement by giving concrete examples, mentioning only movables such as animals, birds, and fishes.\textsuperscript{119} In addition, in his commentary on Aquinas’ \textit{Secunda Secundae} Vitoria stated that once the world was divided ‘those lands belong to those infidels, and … since therefore they are true owners, if they do not want to donate them, it follows that we cannot now retain or capture them. Just as, in the matter of the Indians, certainly no one can capture land from them.’\textsuperscript{120} But this conclusion was similar to his affirmation in the first part of his \textit{relectio De indis} that the peoples of Latin America were the owners of their territories, a conclusion that did not prevent the applicability of the law \textit{ferae bestiae} and the appropriation of unoccupied goods.

On the other hand, in the second part of his lecture Vitoria makes clear in his dismissal of the right of discovery as legitimate title for Spanish power in Latin America that the territories or countries of Latin American peoples were within the scope of application of the law \textit{ferae bestiae}.\textsuperscript{121} In other words, occupation could theoretically be applied to unoccupied lands. Again, Vitoria’s argumentation closed the possibility of applying the law \textit{ferae bestiae} to the whole of Latin America’s natural products, movable and immovable. But as he later drew an exception related to unoccupied movables, it would be plausible that exceptionally deserted places would also fall within the scope of the right of occupation.

Vitoria’s doctrine facilitated the seizing of Latin American natural resources that had not been previously utilized, creating an umbrella of legal possibility for the activities of Spanish conquerors and their successors.

\begin{footnotes}
\item[116] Vitoria, \textit{De indis}, Sect III §18 268. ‘Also there are many commodities which the natives treat as ownerless or as common to all who like to take them’: Vitoria, \textit{De indis}, Sect III §18 162.
\item[117] Whereas the English translation of multa in the Carnegie Series of Classics of International Law is ‘commodities’ (referring only to movable things), the Spanish translation of the same word is muchas tierras (lots of land) that are clearly immovable things. See, respectively, Ibid., and Francisco de Vitoria, \textit{Sobre el Poder Civil; Sobre los Indios; Sobre el Derecho de la Guerra} (Estudio preliminar, traducción y notas de Luis Frayle Delgado, Madrid, Tecnos, 2007) 149-150. In Pagden and Lawrance multa is translated as ‘possessions which they regard as uninhabited’. According to this interpretation, uninhabited places, and thus immovables, were included among the unoccupied things that the Spanish could seize. See Vitoria, ‘On the American Indians’, 3.8 §18 291.
\item[119] Ibid., p. 81.
\item[121] Vitoria, ‘On the American Indians’, 2.3 §31 264-265.
\end{footnotes}
merchants who exploited every natural product of marketable value (animals, trees, plants with medical properties, minerals, fruits, fish, edible plants, etc.). Put simply, through this right the Spanish greatly expanded their power over Latin American natural habitats.122

The ecological implications of the right to occupation were far reaching. Nature was placed under a logic of appropriation whereby its value was measured in relation to the commodities it offered and their economic value. Land, resources, and any other natural element of economic significance were potentially capable of being privately owned. This was not an inconsequential possibility, considering the huge profits to be made from the trade in Latin American goods. In theory, if Latin Americans did not rush to exploit vacant natural resources as intensively as the colonizers, they risked losing economic control over their environment. Independent of who was going to be its new owner, and due to the possibility of appropriation, nature was to be more exploited than ever before.

Two factors contributed toward increasing the impact of the right of occupation. Spaniards’ perception of Latin American nature was conditioned by their idea of wilderness. Portions of forest opened to attract game or certain agroforestry systems123 to collect different kinds of nuts might have looked to their eyes as unoccupied grasslands for cattle and idle trees waiting to be transformed into timber. Even if Latin Americans were actually using particular landscapes, Spaniards logically tended to suppose a lack of occupation in places where they could not detect the environmental impact of human activities. In this context, the Spaniards, who could impose their standard when judging the occupation or lack of occupation of a particular environment, enjoyed the upper hand in deciding how far their private property rights could encroach upon Latin American nature.

Another element that amplified the influence of the right of occupation was the fact that it entered the law of nations at precisely the historical moment in which Latin America became more depopulated and, hence, more unoccupied.124 Even if Vitoria was aware of this phenomenon when he formulated the doctrine of occupancy, he could not have fully comprehended its environmental implications. Following his reasoning, once nature bounced back, extending over places that had previously been cultivated or deforested, the only way Latin American peoples could retain their historical rights of ownership over

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the environment was to reoccupy those landscapes. This was a burdensome task for a rapidly shrinking population, whose freedom of movement became quite restricted because of the conquest.

Due to these two factors, wilderness enormously expanded, both conceptually through the Spanish appropriation of its meaning and factually due to its application to particular geographical locations and the depopulation of the continent. As Latin Americans died, land and commodities were plentiful for the taking.\textsuperscript{125} Nature blossomed, and so did the economic possibilities of the Spanish adventurers and those Latin Americans who rapidly adapted to and benefited from Spanish institutions.\textsuperscript{126} Moreover, the new conception of private property allowed the neglect of one’s possessions.\textsuperscript{127} In consequence, there was no actual limit to the amount of land either that the Crown could grant to the newcomers or that the latter could seize.\textsuperscript{128}

One of the results of these changes in the conception of dominium once it was applied to the land was the formation and slow but steady consolidation of a new institution: the latifundia and a sort of land nobility that were to shape Latin American political, economic, and social life for centuries to come. But ‘land grabbing’ became only noticeable at the end of the sixteenth and during the seventeenth century.\textsuperscript{129} At the time of Vitoria, the economic value of land was minimal, not only because gold or silver were more profitable but also because there was just too much of it.\textsuperscript{130}

The importance of the rights to trade and to acquire common or unoccupied natural resources can hardly be exaggerated. As far as moveables are concerned, and for reasons not attributable to Vitoria, these rights transformed what seemed to be the rule at the beginning of Vitoria’s disquisition—Latin American ownership—into the exception. Most of the continent’s abundant natural resources were opened for European—mainly Spanish and Portuguese—acquisition. Both rights were intertwined, reinforcing one another. The right of occupation was the basis of Spanish trade. Without the property of Latin American commodities, Spanish colonists would have had to buy timber, sugar, gold, or silver from the Latin Americans, considerably reducing their returns. Conversely, trade gave purpose and incentive to the right

\textsuperscript{125} Miller, \textit{An Environmental History}, 101.
\textsuperscript{126} Borah, \textit{Justice by Insurance}, 38
\textsuperscript{127} See Soto’s definition at \textit{supra} footnote 69.
\textsuperscript{128} Borah, \textit{Justice by Insurance}, 38. In fact, the Crown tried with little success to limit the seizure of new landholdings threatening to take the land if it was not productive. See J.H. Elliott, \textit{Spain, Europe & the Wider World 1500-1800} (London, Yale University Press, 2009) 120.
\textsuperscript{129} Keith, \textit{Haciendas and Plantations}, 20.
\textsuperscript{130} MacLeod, \textit{Spanish Central America}, 96. See also Miller, \textit{An Environmental History}, 101. For a good account of land tenure in colonial Latin America see Magnus Mörmer, ‘The Rural Economy and Society in of Colonial Spanish South America’ in Leslie Bethell (ed.), \textit{The Cambridge History of Latin America Volume II} (Cambridge, Cambridge University Press, 1984) 189-217, 190-204.
of occupation. The demand for Latin American commodities in international markets made the apprehension of natural resources extremely profitable.

The legal doctrines of Vitoria and the School of Salamanca provided a paramount contribution to one the most important historical changes unfolding at the time: the emergence of a global economic system. This system set in motion a much-resisted process of global social restructuration of a greater magnitude than ever before, which displaced people to the margins or attracted them to the center of the new global social and economic order in formation. While millions of Latin Americans slowly grew impoverished, a powerful commercial European and Latin American elite consolidated its economic and political power. Their interests would influence colonial policies for centuries. However, it is worth stressing that none of these changes was natural:

Before 1492, most of the preconditions that would be critical for the eventual rise of industrial capitalism were present not merely in parts of Europe but also in parts of Asia and Africa. After 1492, in the sixteenth and seventeenth centuries, Europe acquired three additional preconditions. One was the very considerable accumulation of wealth from the mines and plantations of Latin America and from trade in Asia and Africa. The second, closely related to the first, was the huge enlargement of markets outside of Western Europe for products either produced in Western Europe or imported and then re-exported; that is, a very great and almost constantly growing demand. Third, and most important of all, the social sectors involved with capitalism took political power on a wide scale in western Europe, something that had not happen elsewhere except on very small terrains. This, the bourgeois revolution, allowed the emerging capitalist class-community to mobilise state power towards its further rise...132

The *ius gentium* legitimized the exercise of a very subtle form of environmental hegemony and economic violence, which allowed the transfer of innumerable natural resources to Spanish hands, paving the way for the eventual impoverishment of the peoples of Latin America. Military force was the final guarantor and closure of the system. For Vitoria, the Spanish could only resort to war in order to protect themselves against Latin Americans’ desire to destroy them.133 This characterization of war as self-defense

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131 Koskenniemi, ‘Empire’, 11-12. Latin America played a vital role in the formation of this system. To start with, it provided bullion and non-manufactured goods, mainly fish, timber, tobacco, rice, indigo, sugar, and coffee, for European consumption. In addition, the Latin American colonies became major markets for European manufactured products and African slaves. Finally, gold and silver imported from Latin America allowed Europe to pay for imports from the Middle East and East Asia. See Jeremy Black, *Europe and the World 1650-1830* (London and New York, Routledge, 2002) 57.


133 Vitoria, ‘On the American Indians’, 3.1 §8 283.
concealed the fact that the exercise of private economic rights by an external social group already constituted a sort of violence, less manifest than military confrontation, perhaps, but as destructive in the long run. The Spanish control of trade and encroachment on Latin American natural resources worked to the material disadvantage of the Latin Americans, imperiling their well-being. Nevertheless, this sort of structural economic violence was an invisible component of Vitoria’s system. Resistance against economic oppression was transformed by the law of nations into an attack that triggered the Spanish right to war.¹³⁴

Because the economic rights of the Spaniards were part of the law of nations, any interference with their collective or individual¹³⁵ enjoyment could be interpreted as a wrong, the only reason that according to Vitoria justified waging a war.¹³⁶ Moreover, once a wrong was committed the right to war legitimized an offensive use of force against one’s enemies.¹³⁷ This type of war expanded Spanish economic power immensely. As Vitoria affirmed, it was ‘the general law of nations (ius gentium) that everything captured in war belongs to the victor’.¹³⁸ By virtue of war, the conquistadores acquired Latin Americans’ goods, territories, and even control of their bodies (by making them slaves).¹³⁹ It was logical that as the Spanish carved a sphere of power which allowed them to move freely within the continent (right to travel) and control and exploit the economic resources of Latin America (right of trade and occupation) the Latin Americans would try to oppose, even forcefully, the Spanish presence in their territories. But challenging Spanish economic power by any means created precisely the legal grounds to increase Spanish economic hegemony. Vitoria’s system justified a vicious circle of destitution and violence, which actually came about due to the conquistadores’ rapacious behavior and the Crown’s economic interests in the mineral resources of Latin America.

The conception of nature in Vitoria and Soto

Vitoria’s legal doctrines legitimized the introduction of economic practices that in the hands of the Spanish conquistadores had an adverse effect on the Latin American environment. First, under the right

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¹³⁴ See Anghie, Imperialism, 21-22.
¹³⁵ Vitoria affirms that men can wage war not only for personal protection, but also for the defense of ‘their property’. Vitoria, ‘On the Law of War’ in Anthony Pagden and Jeremy Lawrence (eds), Francisco de Vitoria, Political Writings (Cambridge, Cambridge University Press, 1991) 293-327, 1.1 §1 297-298.
¹³⁷ Ibid.
¹³⁸ Ibid.
¹³⁹ Ibid.
to private property, nature became an object of privatization. Every natural element could be seized in order to serve the particular interests of its owner. For Soto, the distinctive feature of *dominium* was that the power of the proprietor over its property could be exercised solely for its own benefit.\(^{140}\) Second, rights to participate in the commons and occupy vacant resources defined who was to be the main owner of Latin American natural resources. Both rights transferred innumerable elements of natural ecosystems to the Spaniards—even though Latin Americans still retained a fair amount of land for a long time—placing them under the control of those who most profited from their exploitation. Finally, the right to trade gave nature a new function. It served the purpose of satisfying individual consumption at one end of the spectrum and the accumulation of capital at the other end. Whereas nature’s commercial value was taken into account in Vitoria’s formulation of *ius gentium*, the religious and cultural values that it had previously became irrelevant before the law.

Despite their potential use in transforming nature, the economic rights that Vitoria acknowledged created only the possibility of environmental exploitation in Latin America, not its necessity. They operated in a larger ideological context that could have offered a counter ideology that prevented the destruction of nature. After all, and despite the strong economic incentive to commercialize nature, nothing impeded the private owner from preserving it and using it sustainably. Therefore, in order to ascertain whether there was a counterbalance to the exclusive economic value of nature in the *ius gentium*, it is important to consider the way in which Vitoria and Soto conceived nature and the human relationship with it.

Both Spanish scholastics were strongly influenced by Saint Thomas Aquinas, the most famous of all Dominicans. When Vitoria was still a student in Paris, Thomism was already his favorite system, from which he incorporated all other doctrines into his reasoning.\(^{141}\) This admiration continued later during his professorship, to the point of encouraging the use of Aquinas’ texts as the reference for university studies in theology.\(^{142}\) Aquinas was also the most cited author in Vitoria’s lecture *De indis*. Heavily influenced by the Christian doctrine, St Thomas’ views about nature influenced those of Vitoria.\(^{143}\) In

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\(^{140}\) Soto, *De iustitia*, Book IV, 1.1, 279-280 and Book IV, 1.2, 284.

\(^{141}\) Hernandez, ‘The Internationalization’, 1036. See also Ricardo G. Villoslada, *La Universidad de París Durante los Estudios de Francisco Vitoria O.P. (1507-1522)* (Rome, Gregorian University, 1938).

\(^{142}\) Hernandez, ‘The Internationalization’, 1038.

\(^{143}\) For Aquinas, God’s creation was a reflection of his glory and goodness, a place of knowledge, which supported rather than contradicted faith. He believed in the Chain of Being and human superiority over the rest of non-human nature. Even though Aquinas’ consideration of the natural world was less negative than the views of previous theologians like Origen, he was not able to break completely free from their anthropocentric intellectual legacy. Like Origen, he believed that only human beings were created with grace. There was no salvation for animals, plants, and inanimate things, which would be destroyed at the end of time. For Aquinas’ views on nature, see Clarence J. Glacken, *Traces on the Rhodian Shore: Nature and Culture*
fact, as Pagden claims, the whole School of Salamanca explained the natural world and humanity’s position within it by reference to Aquinas’ theories.\footnote{Pagden, The Fall, 61.}

In question 96 of the first part of the \textit{Summa Theologiae}, Aquinas dealt with the question of human mastery over animals in the state of innocence. After having examined the matter, two of his affirmations were of capital importance for the scholastic conception of the relationship between humans and non-human nature. St Thomas stated that before the Fall, non-human nature was subjected to humans so that ‘nothing disobeyed’ them.\footnote{In question 96 of the first part of the \textit{Summa Theologiae}, Aquinas dealt with the question of human mastery over animals in the state of innocence. After having examined the matter, two of his affirmations were of capital importance for the scholastic conception of the relationship between humans and non-human nature. St Thomas stated that before the Fall, non-human nature was subjected to humans so that ‘nothing disobeyed’ them.} This power was derived from the fact that humans had been created in God’s image and thus stood above the rest of creation. In consequence, animals were ‘rightly subjected to his government’.\footnote{Ibid.} Another proof of human mastery over non-human nature stemmed from the idea of the Chain of Being. In the hierarchical ordering of creatures, the imperfect creatures were placed at the service and ‘for the use of the perfect’.\footnote{Ibid.} So, Aquinas affirmed: ‘as the plants make use of the earth for their nourishment, and animals make use of plants … man makes use of both plants and animals’.\footnote{Ibid.}

Another important element of Aquinas’ understanding of nature is related to the Fall. For Aquinas, as for the Spanish scholastics, human mastery over non-human nature diminished because of the Fall. Human original sin tainted the human relationship with non-human nature. Thomas noted that due to humans disobedience to God, creatures that had otherwise obeyed humans were no longer naturally subjected to their power.\footnote{See David Kinsley, “Christianity as Ecologically Harmful” and “Christianity as Ecologically Responsible”’ in Roger S. Gottlieb (ed.), \textit{This Sacred Earth: Religion, Nature, Environment} (New York, Routledge, 1996) 104-124, 109. Aquinas’ anthropocentrism is also emphasized in Steiner’s examination of his views about animals. See Gary Steiner, \textit{Anthropocentrism and its Discontents: The Moral Status of Animals in the History of Western Philosophy} (Pittsburgh (Pa.), University of Pittsburgh Press, 2005) 126-131.} Whereas in paradise natural products were obtained effortlessly as nature cooperated with humans, after the Fall nature turned its back on a fallen humanity. Fortunately for human beings, something had not changed since the time of innocence: non-human nature remained subordinated to the satisfaction of human needs.\footnote{Ibid.} But the price of human disobedience was high. After
the Fall, the need for hard labor in order to extract from nature the products of human subsistence had grown exponentially.

Finally, it is worth mentioning that for Aquinas the difference between humans and the rest of God’s creation was a matter of kind rather than a question of degree. An abyss separated the quality of their respective essences. This becomes obvious in his disquisition about the quality of the world after the judgment. Pondering whether non-human nature will survive God’s judgment, he concludes that:

Now animals and plants were made for the upkeep of human life; wherefore it is written (Gn. 9:3): “Even as the green herbs have I delivered all flesh to you”. Therefore when man’s animal life ceases, animals and plants should cease. But after this renewal animal life will cease in man. Therefore neither plants nor animals ought to remain.\footnote{The Collected Works, Supplement (QQ. 1-99), Treatise on the Last Things (QQ. 86-99), Q 91 A 5 OTC para. 3/3.}

This conclusion was a consequence of humans’ double dimension: part animal, part rational being. Whereas the animal nature of humans was corruptible and mortal, the rational soul was incorruptible, having therefore the potential of immortality. In contrast, animals and plants were corruptible ‘in their whole’.\footnote{Ibid., Q 91 A 5 Body.} There was a fundamental asymmetrical logic in the way Aquinas treated the essences of different beings according to their level of perfection and perfectibility.\footnote{Santmire, The Travail, 94.} The result of the imperfection that characterized non-human nature was that they were not to be perpetuated in the renewal of the world.\footnote{Ibid.}

There are few explicit references to nature in \textit{De indis}. The first can be found in the discussion of whether Latin Americans’ sinfulness was a reason for denying them dominium over their lands. As St Thomas, Vitoria’s ideas about nature were influenced by his religious condition. So, he cited Genesis in order to explain that dominium was founded in the image of God: ‘Let us make man in our own image, after our likeness; and let them have dominion over the fish of the sea and over the fowl of the air, and over the cattle, and over all the earth ...’.\footnote{Vitoria, ‘On the American Indians’, Sect I §5 121.} This reference to the Bible was part of a larger disquisition in which Vitoria rejected the notion that sinners did not have dominium.
Vitoria’s views were common among the Spanish scholastics, and particularly within the Thomist tradition.\textsuperscript{156} In the *History of the Indies*,\textsuperscript{157} Las Casas gave a similar explanation of the creation of the natural world and humanity’s position in it. Explaining the topics to be covered in Chapter 1 of the first book, he stated: ‘This chapter deals with the creation of heaven and earth. - How God gave it, with all its lower creatures for human mastery. - How this mastery diminished as a consequence of the original sin…’.\textsuperscript{158} Similarly, he stated that God had created nature for the health and utility of human beings, describing it as a ‘world machine’ dedicated to mankind.\textsuperscript{159} For Soto, humanity’s resemblance to God stemmed from the fact that they too had power over the world’s irrational creatures.\textsuperscript{160}

At the time of Vitoria, the Christian interpretation of humanity, nature, and their mutual relationship was based on the creation of the world as narrated in the Genesis. At the beginning of human history, God’s mandate was clear: be fertile and increase, fill the earth and master it. The difficulty in deciphering the meaning of God’s will in this passage and, for that matter, in the Bible at large is that there is no fixed meaning attached to biblical words, making permanent interpretation necessary.\textsuperscript{161} So the biblical implications of human mastery over nature are not completely clear. How then should humanity relate to the environment?

There have been two main interpretations of the way in which Christianity understood and fulfilled God’s mandate. According to one position, dominion over nature facilitated its actual domination and eventual exploitation, because the power conferred to humanity was unlimited.\textsuperscript{162} A more lenient view of Christianity holds that identifying dominion with domination misrepresents the function assigned to humans in the divine scheme. In reality, dominion over non-human nature could be interpreted as a responsible and restricted mandate, enshrined in the notion of stewardship.\textsuperscript{163} Humanity was assigned a superior position in regard to nature in order to care for and protect it and not to spoil it.


\textsuperscript{158} Ibid., Vol I Book I Ch 23.

\textsuperscript{159} Ibid., 25.

\textsuperscript{160} Soto, *De iustitia*, Book IV, 1.2, 284. The control of human power over nature was extended by Soto to the four natural elements, namely air, water, land, and fire. Ibid., Book IV, 2.1, 288.


\textsuperscript{162} See Lynn White Jr., ‘The Historical Roots of Our Ecological Crisis’ 155 *Science* (1967) 1203-1207. A critique of Christianity from the perspective of a descendant of North American peoples can be found in Deloria Jr., *God is Red*.

Vitoria did not explain his interpretation of the purpose of human *dominium*. He was silent as to the type of power that it entailed. Therefore, we cannot judge Vitoria’s ideas about humanity’s relationship to nature based solely on this statement. We can only know that his ideas were inspired by religious beliefs, as later in the text he reiterated that *dominium* was based on humanity’s resemblance to God.164 Unlike Vitoria, Soto explicitly explained that the objective of human *dominium* was to create a right to subjugate the Earth and dominate animals and the natural elements.165

Later in Vitoria’s lecture, there is a more revealing reference to nature. He refuted the argument that even irrational creatures might have dominion, asserting that ‘… wild animals have no rights over their own bodies (*dominium sui*); still less can they have rights over other things. The major premise is proved by the fact that it is lawful to kill them with impunity, even for sport.’166

Vitoria started his disquisition about animals claiming that they, as all irrational creatures, could not be proprietors. In the Thomist tradition, human resemblance to God implied that animals were ‘objects of human *dominium* rather than subjects of *dominium* themselves.’167 His position reflects the common anthropocentric theological assumptions of his time and the doctrinal legacy of St. Thomas168 and Aristotle.169

In *De iustitia*, Vitoria had also referred to passages in the Genesis 1:26-28170 and Psalms 7:8171 in order to prove human mastery over nature.172 He drew on Aristotle to defend humanity’s superior place in the Chain of Being in comparison to non-human nature.173 The Chain of Being was based on the Christian belief that all creatures were ordered in a scale of perfection from the lowest to the most noble: God. For Vitoria, low creatures existed for the sake of higher ones, who could thus use and abuse them at will.174

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167 Brett, *Changes*, 47.
169 Ibid., 57-76.
170 See supra footnote 72.
171 Referring to the human being the passage declares: ‘You make him master over all that you have made, putting everything in subjection under his feet.’ In The Revised English Bible this verse is in Psalms 8:6. See *The Revised English Bible*, Psalms 8:6, 468.
173 Vitoria, *De iustitia*, 72. As cited in Tierney, 263. Reference to the Chain of Being was common at the time of Vitoria. Las Casas, for instance, stated that: ‘Rational nature, after the angelic, is nobler and more perfect than any other created thing, and thus is the best and noblest part of the whole universe, to the extent that it has a greater resemblance to God.’ See Las Casas, *Historia*, Vol I Book I Ch I 23. Soto refers to the Chain of Being without explicitly mentioning it in Soto, *De iustitia*, Book IV, 1.2, 284. In *De Indis* Vitoria cites Silvestro Mazzolini da Prierio in support of the hierarchical belief that the ‘elements exercise dominance over one another’. See Vitoria, ‘On the American Indians’, 1.4 §20 247.
Tierney affirms that, for Vitoria, ‘through the exercise of the gifts of reason and will man could dominate the rest of created nature; and this was fitting since, by virtue of these gifts, man was made in the image of God and so endowed with a power analogous to God’s absolute dominion.’

Vitoria granted humans a broad power over nature based on the opposition of proprietor to property and the right of possession for the former over the latter. The Dominican scholar understood human ownership in absolute terms. Humans could resort to the ultimate way of controlling another entity: its destruction. In Soto, we find the same right to kill animals as a prerogative of *dominium*. Even though both scholastics only referred to animals, the same treatment was extendable to the rest of non-human nature, considering that animals occupied a higher place than flora or inanimate nature in the Chain of Being.

Vitoria and Soto’s views on human ascendancy over animals make clear the kind of power that these authors derived from human *dominium*. For most authors of Second Scholasticism, human superiority over non-human nature was a necessary consequence of humans having been created in the image of God. Contrastingly, based on the same Christian premises, Las Casas arrived to the contrary conclusion. Humans could not use animals and other natural life as they pleased. They had to realize God’s plan for the fulfilment of nature’s perfection. For him, human superiority over the environment was limited by God’s program, the content of which was, nonetheless, left undefined. These kind of limits are absent from Vitoria’s and Soto’s texts. In principle, humans did not need to justify unsustainable practices because the most extreme of them, the destruction of nature, could be freely performed—even for pleasure (according to Vitoria). *Dominium* demarcated a personal space of absolute power over one’s property. As far as human power over nature was concerned, being a proprietor was like being a demi-God. It is evident which of these contrasting interpretations—that of Vitoria and Las Casas—fitted better with the economic ethos of Spanish imperialism.

Still, we should be cautious when interpreting the views of Vitoria and Soto on human *dominium*, as well as its environmental implications. Even if from a contemporary environmental sensitivity their views appear distinctly anthropocentric, there was still a clear limit to this anthropocentrism. For them, the purpose of the absolute power that humans had over nature was not personal enrichment. The School

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175 Ibid., 268.
176 For Soto as for Vitoria, *dominium* is the power over the very nature of the thing possessed. This entails destroying one’s property, as for example killing an animal. Soto, *De iustitia*, IV, 1.1, 281.
177 Soto, *De iustitia*, Book IV, 1.1, 279.
178 See also López, ‘Propiedad y Dominio’, 82.
of Salamanca was in principle opposed to the accumulation of capital.\(^\text{180}\) Human power over God’s creation resulted from the need for human preservation.\(^\text{181}\) The satisfaction of basic human needs had become severely compromised after the Fall because nature no longer spontaneously supplied humanity with its bounty.\(^\text{182}\) Therefore, the natural corollary of the need to transform nature more thoroughly in order to subsist was to grant humans the power to do so. It was the task of the Spanish scholastics to develop the legal institutions conducive to that end.

It is true that for Spanish scholastics there was no constraint to human power over nature and that, as Vitoria affirmed, it could even be exercised for mere pleasure. In this sense, their views seem compatible with and even favorable to the exploitation of nature. But there was still a limit to the scope of applicability of human environmental power based on the necessity of securing sustenance. But this limit, derived from a particular religious notion of human history and which could have acted as a counterbalance of the profit motive, was never incorporated into the secular *ius gentium*. More importantly, the utilization of nature for mere subsistence did not fit nicely with the ambitions of the European monarchs and economic elites who, in the process of European world expansion, realized the important gains to be made from the worldwide exploitation of ecosystems.

**Concluding remarks**

It is likely that without the obsession of the conquistadores for quick wealth and the enormous dividends that Latin American natural resources gave the Crown, Latin American nature would have fared better. In spite of the different priorities of the conquistadores and the Spanish Crown when it came to the use of Latin American natural habitats, in the context of increasing material ambitions, the Spanish economic rights that Vitoria sanctioned were used to legitimize economic domination and environmental exploitation in Latin America.\(^\text{183}\) Ideas about nature provided the ideological background in which concrete economic practices flourished. At the same time, those practices and their value for empire


\(^{181}\) In his *relectio De Dominio*, Soto distinguishes between natural, divine, and human *dominium*, explaining that natural *dominium* is given by nature so that humans can eat and drink. Soto, *De Dominio*, §9 99. He then added that by nature humanity has a right over everything that is needed for its conservation: Ibid., §13 107.

\(^{182}\) Soto, *De iustitia*, Book IV, 3.1, 296.

\(^{183}\) See supra Chapter 1, 29-35.
shaped ideas, which eventually tended to conform more and more with the economic ethos of imperialism.

Latin America helped create an incipient but vibrant global economy, in which considerable power was accumulated, albeit in only a few hands, by the appropriation, extraction, and exchange of natural products. It was thus only a matter of time before the fragile, non-legal limits that Vitoria and Soto had established were finally transcended. In fact, following centuries witnessed the rise of other European powers and economic operators with similar dreams of wealth. In order to satisfy their ambitions, they seized innumerable natural resources in Latin America, Asia, the Pacific, and Africa. The history of colonialism is also a history of economic elites (mostly of European origin) and their ascending power over nature worldwide.

Latin Americans had occupied, consumed, used, and traded natural resources for centuries. They had also shaped nature significantly, and not always sustainably. However, the legal infrastructure provided by Vitoria allowed for the privatization and exchange of nature-as-commodity on a continental scale. The use of that power to apprehend and exploit Latin American ecosystems entailed a substantial intensification of the pre-colonial pattern of nature alteration. In the absence of any limit to the materialization of Spanish economic rights, the fact that, for instance, the exploitation of timber and the establishment of huge mines and innumerable sugar plantations displaced more sustainable uses of the same ecosystems was considered not only legal but also desirable. Legitimized by the economic rights that the *ius gentium* recognized, the exchange economy of the sixteenth and seventeenth centuries (in which Latin American natural resources played a pivotal role) took shape, becoming one of the main engines for some of the most significant and deleterious environmental changes of the Early Modern era.

Despite being aware of the novelty and importance of the moment in which he was writing, it would be disingenuous to make Vitoria responsible for the historical and ongoing human and environmental tragedy that has resulted from centuries of global wealth accumulation. Perhaps more striking than the historical construction of this drama at a time in which the world’s natural habitats seemed almost infinite is the continuation of human and environmental suffering in the face of today’s awareness of the dreadful impact of global economic arrangements on both peoples and landscapes. No intellectual effort seems to be able to help humans wake up from the dream of owning nature and prizing what is freely (though not

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185 See in general Richards, *The Unending Frontier*. 

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necessarily unlimitedly) at our disposal (like air, water, and food). It may be that it is not the brain but an organ situated in the chest of our persona that this message needs to reach.
3 Between Rationality and Bestiality: The Nature of Latin Americans and the Conceptual Appropriation of Latin American Nature

Wild men … are like uncultivated land that produces weeds and useless thorns, but has within itself so much natural virtue that cultivating and farming it gives domesticated, healthy and useful products.¹

The development of a vocabulary of economic rights that allowed the material apprehension of ecosystems was just part of the way in which Latin American nature was colonized. As important as those instruments were, there was also a need for an ideological justification of that appropriation. That justification was partly developed in the context of debates about the nature of Latin American peoples. Assessing the level of rationality and social sophistication of Latin American peoples was vital to define their place in the new colonial society as well as the way in which Spaniards ought to relate to them—as master or primus inter pares (first among equals).

Some Spanish commentators argued that Latin Americans were similar to animals. Accordingly, they could perform the same function as domesticated animals in the new colonial economy: that of a free labor force. Spanish Dominicans strongly disagreed with this characterization. Forced labor was a hindrance to evangelization. Weakened, demoralized, and fearful, Latin Americans were less inclined to convert. Besides, only rational creatures could understand the redeeming message of God. Therefore, Dominicans strongly emphasized Latin Americans’ rationality and capacity to receive the Gospel, but fell short of affirming the parity of the pre-colonial population with the Spanish.

Vitoria recognized that Latin American societies were somehow deficient. Likewise, Las Casas and Acosta identified a certain kind of barbarism that affected some Latin American societies. One of the reasons that explained their backward condition was their deficient control of nature. Most Latin American societies lacked the capacity for scientific knowledge of their surroundings as well as the

technical tools to exploit them. Because of these shortcomings, they had developed a limited mastery over nature. Many Latin American peoples were mere hunters, thus lacking the social sophistication and capacity to alter ecosystems that was characteristic of agricultural societies.

The natural corollary of the belief that Latin Americans could not deeply alter the ecosystems of the continent—the great Empires of Tawantinsuyu and Anahuac being an exception—was the belief that most Latin American natural habitats were wild and unused. Neither Vitoria, nor Las Casas or Acosta for that matter, developed this line of reasoning in-depth. As friars, they were less interested in the exploitation of natural resources than in evangelization. Still, they were convinced that Spaniards could create more sophisticated societies by exporting their superior agricultural techniques and capacity to exploit nature. This did not mean that they ought to displace Latin Americans, but rather to instruct them in their superior methods.

Of more importance, perhaps, than the concrete deployment of these ideas in the Latin American context was the influence that they had in the history of the law of nations, and in later debates about the nature of the colonial population and their capacity to transform their environments. The belief that Spanish colonists and Europeans in general had a superiority in mastering nature vis-à-vis the populations of the continents that Europeans colonized is what I have termed the ‘conceptual appropriation of nature’. This is the story to which I now turn attention.

The conceptualization of a progressive way of using ecosystems, and a backward one, redefined how nature ought to be utilized in the colonies. As shown in the previous chapter, European commentators had developed the legal tools to materially apprehend nature. As this chapter will demonstrate, they also created an ideological justification to do so. The rationale that presented Europeans as efficient manipulators of colonial environments, and that manipulation as socially more progressive than pre-colonial uses of those environments resulted in a compelling urge to transfer colonial natural resources to the hands of the colonists. The Catholicism of Vitoria, Las Casas, and Acosta played a relevant role in this story too. The fact that Latin American societies revered natural deities was interpreted as a sign of backwardness. Nature’s sacredness imposed insurmountable limits to its scientific observation, technical manipulation, and economic exploitation, preventing precisely the kind of human power that redounded in social amelioration. Infidel belief in the power and aliveness of nature were tolerated in the early stages of Spanish colonization but later became punishable, even by death.

The fact that Latin Americans treated nature as a living entity was a definite proof of their backwardness. Latin American worship of what for the Spanish were clearly inferior entities was the
ultimate proof of social inferiority. Evangelization served to break this retrograde myth, and introduced a novel way to look at nature, one that for the Spanish scholastics was undoubtedly more progressive. Nature was God’s creation and was to be subordinated to human interests. The religious element reinforced the conceptual appropriation of nature. The progressive mastery of nature associated with European imperialism was not only a secular project oriented toward human social advancement; it was a way of fulfilling humans’ preeminent place in God’s creation and their mandate to fill the world and master it. The next pages describe the first historical steps in the development of this narrative of progress predicated on the colonists’ environmental mastery and preeminence.

*Non-assimilability and the fusion of Latin Americans with nature*

The destructiveness of Spanish conquest gave rise to moral doubts. Those who ventured to the other side of the Atlantic wanted to believe that their behavior in the conquest of Latin America was either ethically correct or at least justifiable. In this sense, Christianity offered the conquerors a solid rationalization of their conduct. Their enemies were also God’s rivals and, consequently, they lived outside the scope of the moral law applicable to believers. Few colonists doubted that God had vested in them the power to carry the gospel to the furthest corners of the world. Thus, they felt they were part of a global mission of evangelization.

The religious ideology of Spanish imperialism was not specifically designed for Latin America. It first emerged and was consolidated within European borders during the Medieval Era. The concept of just war sanctified crusades against Muslim infidels for the glory of the Holy Church. Contrastingly, the Iberian Peninsula, a land of diverse peoples, traditions, and faiths, enjoyed relative freedom of worship for centuries under Muslim rule. In general, Jews, Muslims, and Christians could practice their religion without fear in Muslim areas and Christian territories.

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4 Rawlings, *Church*, 100.
5 Ibid.
6 Jennings has described the use of papal bulls to enslave and take lands and property from pagans: Ibid., 4-5. It is worth noting that religious wars were also motivated by economic and social factors. See James Muldoon (ed.), *The Expansion of Europe: The First Phase* (Philadelphia, University of Pennsylvania Press, 1977) 4-5.
7 Rawlings, *Church*, 1.
Freedom of religion ended abruptly during the last stages of the *Reconquista* or the War of *Reconquista*. In 1492, harsher religious policies forced the Jews to leave Spain. Soon afterwards, Muslims were given the choice of conversion or exile. Attaining internal homogeneity by purifying the emerging Spanish nation from alien beliefs was the first step toward the dissemination of the new common faith. Once internal cohesion was achieved, evangelization contributed to the unification and consolidation of the power of Spain over its distant kingdoms. In Latin America, preaching the gospel was part of a broader process of Hispanicization.

The Bull *Inter caetera divinae* issued by Pope Alexander VI on 1493 gave the Crown of Castile ‘full and free power, authority and jurisdiction’ in Latin America under the condition of Christianizing the lands that Columbus had claimed for his royal sponsors. After 1542 concerns about mistreatment of Latin American peoples forced the Crown to remove them from the direct supervision of the conquerors, increasing the authority and role of religious orders in the process of colonization.

Christianity contributed to colonization in two different ways. First, it created distance between colonizer and colonized by distinguishing Christian from infidel, which legitimized the use of violence as an instrument for conquest. Then, once Spanish occupation consolidated, it dissolved previous dichotomous categories, bringing both Spaniards and Latin Americans under the unifying umbrella of a common faith. The new religious fellowship facilitated the processes of homogenization and normalization, which were desperately needed for the cohesion of an empire that encompassed innumerable subjects and myriad different groups, some quite rebellious.

In spite of Christianity’s undeniable contribution to the consolidation of the Spanish empire, evangelization was not unproblematic. If colonizer and colonized were considered as part of the same religious community, the separation and subordination of the latter to the former was no longer tenable. This obstacle was easily overcome in practice as Latin Americans were forbidden religious education, priesthood and learning Latin, the language of the Church. Spaniards retained the upper hand in deciding the correct meaning of religious doctrines. This power was used to their advantage. Without the capacity to influence the only ideology at hand to interpret reality, Latin Americans could not problematize and challenge their subjugation from within the colonial society. Because the possibility of

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8 Ibid.
9 Ibid.
13 Seed, *Ceremonies*, 121.
Latin Americans using the Catholic doctrine as an element of emancipation was prevented from the outset, Catholicism became profoundly sedative. It naturalized power hierarchies, discouraging any attempt to unveil their historical formation.

Spaniards justified this sort of discrimination by reference to Aquinas’ distinction between rational creatures who could be fully Catholic and those who could just accept but not entirely understand Catholicism and, hence, were not fully rational. In the new ideology of empire, this moral classification turned into a political distinction between people of reason (Spaniards) and people who were not entirely reasonable (Latin Americans).

The question of Latin Americans’ rationality was part of colonial debates since the beginning of the sixteenth century. In Christian thinking, reason was considered both humanity’s main attribute and the dividing line between humanity and the animal world. In consequence, for those who wished to uphold Latin Americans’ lack of rationality, comparing them with animals was a convincing way of undermining their status. So, for example, when Palacios Rubios was informed that Latin Americans still worshipped idols, he reacted to the news by describing them and all unbelievers as irrational animals. Similarly, the licenciado Gil Gregorio compared them to ‘talking animals’, and for the conquistador Jofré García de Loaysa they were like soulless parrots in human guise. Latin Americans were also compared to horses, assess, birds, fishes, spiders, and brute beasts. Their association with animals was a repeated feature of the early literature of discovery.

The influential voice of the humanist philosopher and theologian Juan Ginés de Sepúlveda (1490-1573) joined the debate on the nature of Latin American peoples. Sepúlveda had worked at the service of both Pope Clement VII and the Spanish king Charles V once he became Emperor. A famous advocate

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14 Ibid., 119.
15 This doctrine—a deformed version of Aquinas’ original idea—served to reinforce the subordination of Latin American peoples. Ibid., 120.
16 Seed, ‘Are These Not’, 636.
17 As previously mentioned, he was the royal jurist who wrote the requerimiento.
18 In his own words: ‘Los Sarracenos que como animales carentes de razón, adoran a los ídolos, despreciando al verdadero Dios.’ See Seed, ‘Are These Not’, 638.
19 Pagden, The Fall, 93.
of the submission of Latin American peoples to Spanish rule, he came close to endorse their bestiality in his *Democrates Secundus Sive de Justis Causis Belli apud Indios*,\(^\text{23}\) where he assessed the justice of Spanish wars of conquest. They were, he affirmed, ‘as inferior to the Spaniards as children are to adults, women are to men … and finally, I shall say, almost as monkeys are to men.’\(^\text{24}\) It was hard to find in them any vestige of humanity.\(^\text{25}\) Sepúlveda expressed Latin American’s inferiority by reference to standards of age, gender, and rationality familiar to his contemporary audience. These hierarchical opposites encapsulated the particular nature of Spanish superiority according to Sepúlveda. Each comparison widened the gap that separated colonizer and colonized while constructing their identities by the opposition between self and other.\(^\text{26}\) The final reference to apes, even if cushioned by the adverb ‘almost’, carried a special emphasis. Apart from being childish, inexperienced, feminine, and impotent, Latin Americans were mentally deficient too. The faculties of their mind had, for Sepúlveda, an exclusive mechanical nature, similar to those of ‘beasts, birds and spiders’.\(^\text{27}\)

Several commentators on colonial matters identified rationality, civility, and Christianity with Spanish origin. Contrastingly, by comparing Latin Americans to inferior creatures such as animals, they attributed them irrationality, incivility, and paganism. The opposing nature/humanity construct brought together features that belonged to the mental, social, and religious spheres. The advocates of the thesis of Latin Americans’ lack of humanity assimilated them to the environment. In so doing, they used an extreme formulation of the ‘state of nature’\(^\text{28}\) a century before this concept would fully crystallize in European political thinking. In its moderate version, the ‘state of nature’ described the condition in which humans lived before entering civil society—an existence that lacked all the elements that Europeans generally associated with civil life.

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\(^\text{23}\) Juan Ginés de Sepúlveda, *Tratado sobre las Justas Causas de la Guerra contra los Indios*, con una advertencia de Marcelino Menéndez y Pelayo y un estudio por Manuel García-Pelayo (México, Fondo de Cultura Económica, 1941).

\(^\text{24}\) Ibid., 101 [translated by author].

\(^\text{25}\) Ibid., 105.

\(^\text{26}\) For Seed, the identification of Latin Americans with animals was a definition of them as ‘radically Other than the Spaniards’. See Seed, ‘Are these Not’, 638.


\(^\text{28}\) Spanish scholars used the image of the state of nature but not the term, as it had not yet been coined. It is, nevertheless, important to distinguish this term from the ‘state of integral nature’, ‘state of innocence’, or ‘state of grace’, that for the Spanish scholastic designated the period from the beginning of the world until the Fall. This prehistoric age preceded the pre-political/civil ‘state of nature’. Christian thinkers borrowed this image from Roman Golden Age narratives which, according to St Ambrose, had been adopted from Hebrew Scriptures. For a detailed account of the historical formation of the term see Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge, Cambridge University Press, 2007) 107-135. See also López, ‘Propiedad’, 83.
The theory of the natural slave and its applicability to the peoples of Latin America was at the crux of most discussions of their character. ‘Created by nature to wander aimlessly through forests, without laws or any form of government’, the natural slave lived in a kind of ‘state of nature’. St Thomas Aquinas, after all, considered reason (man’s speculative intellect) as the sole element that allowed ‘him alone among God’s creatures to exploit the potential in the natural world’. In consequence, the more Latin Americans blended with nature, the less rational they appeared, and the less they could claim legal parity with the Spaniards. Their condition as natural slave would justify their subjection to forced labor. At the other end of the spectrum, rationality—the capacity to transcend nature, humans’ first home, in order to create both a political community and a material culture that would become humans’ final home—would have placed Latin Americans as subjects of the Spanish Crown, and therefore entitled them to the Crown’s protection.

The discourse on Latin Americans’ bestiality was not homogenous. In its most radical formulation, Latin Americans were considered almost part of the eco-system, or in the words of Bernardino de Minaya ‘a third species of animal between man and monkey created by God for the better service of man’. Despite the literal meaning of these words, the advocates of the extreme interpretation of Latin American bestiality never actually doubted their human nature. Their real intention was rather to emphasize Latin Americans’ lack of rationality so that it would seem absolute and immutable, preventing Latin Americans from ‘catching up’ with the Spanish. Their inferiority was the basis for a legitimate system of legal inequality.

Asserting Latin Americans’ incapacity for progress was part of a strategy to influence the debate on their proper treatment, in consideration of their economic value as labor force. Spanish commentators knew as well as Vitoria that ‘wild beasts and all irrational beings are subject to the power of man, even more than slaves’. The president of the Audiencia of Mexico, Bishop Ramírez de Fuenleal explained the behavior of the apologists of Latin Americans’ lack of reason, stating that ‘those who wish to hold

30 Ibid., 72.
31 Ibid., 104
33 Ibid., 638. For all Christian confession, ‘the dividing line between human and animal agency’ was taken as ‘the ultimate dividing line between the political and the non-political’. See Brett, *Changes*, 60.
34 For Elliott: ‘The equation between bestiality, irrationality and barbarism was easily made; and those who made it could then proceed to draw on Aristotelian doctrine to justify Spanish domination over the Indians as both natural and necessary.’ See Elliott, *The Old World*, 44.
these (Indians) in subjection as beast’ do so in order ‘to benefit themselves’.36 The Spaniards regarded animals and the environment at large as commodities. Thus, those who were almost like a natural resource could be equally possessed,37 dispossessed, and used in the Spanish mines and encomiendas without remorse or doubts of conscience.

The problem with this radical position was that the absolute irrationality of the peoples of Latin America amounted to their incapacity to receive the Christian creed.38 These types of allegations not only threatened the role of religious orders in Latin America, but could also put in jeopardy the political authority that the papal bulls had granted the Spanish Crown.39 Aware of this risk, some authors adopted a middle position between full rationality and complete irrationality. Sepúlveda, for instance, upheld Spanish superiority while making room for evangelization. Despite comparing Latin Americans with animals and denying them any trace of humanity in certain sections of his work, he still maintained that they were capable of improving. Their inferior condition was not permanent and, consequently, evolution was possible. Through the evangelizing mission, they could be enlightened and converted by their Spanish masters.40 Thus, Sepúlveda wondered:

What could be more convenient to the barbarians than being subjugated to the imperium of those whose prudence, virtue and religion would transform them from barbarous, so that they barely deserved to be called human beings, to civilized men as far as they can be; from inept and libidinous, into truthful and honest, from impious and servants of the devil, into Christians and worshipers of the true God.41

In Sepúlveda’s vision of empire, nature provided a standard to appraise the humanity of Latin American peoples. Their partial or absolute comparison to animals was the ultimate and most powerful tool to conceptually capture (and construct) the dreadful condition in which the Spanish had found them. According to Pagden, Sepúlveda and other humanists like Vasco de Quiroga believed that Latin Americans lived in ‘what was in effect the state of nature’.42

37 See Beatriz Pastor Bodner, *The Armatour of Conquest* (California, Standford, 1992) 210-211.
38 Elliott, *The Old World*, 43.
39 As Seed puts it: ‘to challenge Spanish authorities for failing to Christianise the natives was to challenge them for failing to exercise political power legitimacy in the New World.’ See Seed, ‘Are These Not’ 635.
Less radical than the thesis of some of his contemporaries, the doctrines that Sepúlveda upheld in his *Democrates Secundus* still had dire implications for the peoples of Latin America. Their condition of natural slaves, a status that Sepulveda vindicated, legitimized just war. Therefore, they could only be converted after military defeat and pacification. However, the aftermath of conquest did not represent an improvement of their situation. Survivors had to accept assimilation. This was so, because the condition of natural slave could only be transcended by reception of the Christian credo. This was the logic behind the *encomienda* system: evangelization in exchange for compulsory work. Less deadly than war in the short term, this system of forced tutelage was nevertheless considerably harsh and injurious in the middle term, and accounted for innumerable deaths. Importantly, Sepulveda advocated the subjection to the *encomienda* even for those peaceful Latin Americans who had converted to Catholicism and recognized Spanish sovereignty.

The rather negative terms with which Sepúlveda described Latin Americans conveyed the impression that the cultural distance between them and their Spanish masters was an abyss. In consequence, the strict patronage under which Latin Americans were placed had to be extended in time because the extreme character of Latin Americans’ natural inferiority delayed evolution. Conversion looked, at best, like an arduous and lengthy process, the duration of which was uncertain. All these considerations called for the perpetuation of the *encomienda* system. Sepulveda’s idea of evolution put all the power in the hands of the Spanish, which created the possibility of manipulation. Those who judged the religious improvement of the Latin Americans were the most interested in denying it in order to maintain the status quo. Montesinos complained that the *encomenderos* tried to delay evangelization by depriving the Latin Americans time for religious service. Even presupposing the good will of the Spanish conquistadores,

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43 As above mentioned, the *encomienda* was a system of forced labor whereby Latin Americans were assigned to a Spanish colonist in return for a small wage, protection, and evangelization. For an overview of the *encomienda* see Robert G. Keith, *Conquest and Agrarian Change: The Emergence of the Hacienda System on the Peruvian Coast* (Cambridge, Harvard University Press, 1976) 27-54.


45 See Sepúlveda, *Tratado*, 175.

46 Fray Bernardo de Mesa, a royal preacher, recognized the difficulty of converting the Latin Americans: ‘no one of sound mind could say these Indians do not have the capacity to receive our faith … but I dare to say that there is in them such a little aptitude by nature and habit that in order to bring them to the faith … a great deal of work is necessary.’ See Las Casas, *Historia*, Vol III Book III Ch IX 462 [as translated in Seed, ‘Are These Not’, 640-641].

47 Seed, ‘Are These Not’, 634-635.
evolution was only possible under the assumption that the Latin Americans would passively accept indoctrination, that is, ‘the imposition of a certain kind of hegemony’.48

Inspired by religion, Sepulveda’s conception of the evangelizing mission trapped Latin Americans in a vicious circle. Resistance to assimilation, even if moderate, could be interpreted not only as a rejection of the gospel but also of the very idea of religious and human progress. That negative response would only confirm Sepulveda’s prejudice about Latin Americans’ low rationality, impious customs, and minimal capacity for social advancement.49 The simpler Latin Americans’ mores were considered, the more justifiable violence seemed. In turn, violence would just strengthen the desire to resist Spanish presence.

Sepúlveda’s views on the conquest of Latin America were incompatible with the position adopted by Las Casas and the School of Salamanca—Vitoria and Soto, among others. Even if Las Casas and Vitoria did not agree on all matters, their defense of Latin Americans rationality was in stark opposition to Sepúlveda’s vision of Spanish empire in Latin America. Hence, Sepúlveda’s opponents moved behind the scenes and used all their influence in order to prevent the publication of *Democrates Secundus*.50 They achieved their objective, something that Sepúlveda deeply resented.

Sepulveda’s intellectual efforts to convince Spanish political and religious elites of the convenience of the *encomienda* and the subjugation of the Latin Americans threatened the advocacy campaign that Sepúlveda’s fellow Dominicans had for decades been waging in favor of Latin American peoples.51 Growing international concern and even criticism of Spanish colonial practices created hesitation among royal circles and religious authorities about the right course of action in Latin America.

The stakes were high and, thus, the pressure of the advocates of a benevolent colonial approach in Latin America intensified. Following the recommendation of the Council of the Indies, the Emperor decided to suspend the ultramarine wars of conquest until the question of whether colonial expansion was just or unjust could be discussed and settled. This context led to the famous but inconclusive Valladolid debate between Sepúlveda and Las Casas. In Valladolid, both authors exposed their arguments for and against the wars of conquest.52 The clash between Sepúlveda and Las Casas was the result of irreconcilable

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48 Ibid., 635.
49 As Seed maintains: ‘Refusing, resisting, or even misunderstanding this foreign religion were interpreted as “stupidity”, lacking the capacity for assimilation, being little better than beasts.’ Ibid., 647.
52 The arguments of Sepúlveda and Las Casas can be found in Juan Ginés de Sepúlveda y Fray Bartolomé de Las Casas, *Apología*, traducción castellana de los textos originales latinos, introducción, notas e índices por Ángel Losada (Madrid, Editorial Nacional, 1975). I have presented a brief summary of the main arguments of both contenders in Manuel Jiménez
visions about the right course of action for the Spanish in Latin America. It was also an ‘ethnological’ quarrel between those who predicated the non-assimilability or quasi-non-assimilability of the Latin American peoples and those who understood them as part of the same human and legal community.

*Under the same universal legal umbrella: Las Casas and Americans’ civility*

Las Casas stands far above those who opposed the injustices of Spanish imperialism. His contribution to international law is confined to the field of human rights and indigenous rights, which has afforded him little space in international legal monographs.\(^{53}\) Contrastingly, his multifaceted life and work has attracted more attention from the social sciences than any other participant in the colonization of Spanish Latin America.\(^{54}\) He is a controversial figure, described in divergent ways as both the father of European anti-colonial struggle\(^{55}\) or an advocate of ecclesiastical imperialism\(^{56}\).

Touched by Montesinos’ sermon, Las Casas experienced a crisis of conscience that led him to a radical change in life. He renounced his slaves and his position as *encomendero*, and started a fierce crusade to defend the Latin Americans that ended only with his death. Based on his first-hand experience in Latin America, he criticized the cruel and inhumane treatment to which the new subjects of the Spanish Crown were subjected, particularly through the *encomienda* system\(^{57}\) and the institution of slavery.\(^{58}\) Both systems of labor placed Latin Americans under the tutelage and command of the conquistadores, who often mistreated them. As an alternative, he suggested they ought to be under the direct jurisdiction of the Spanish king.\(^{59}\) In recognition for his efforts to promote justice in Latin America, the Crown\(^{60}\) awarded him the title of ‘protector of the Indians’.\(^{61}\)

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\(^{54}\) Castro, *Another Face*, 2-3.


\(^{56}\) See Castro, *Another Face*, 13, 21, 63, 67, 156 and 182. Castro concedes that Las Casas was anti-colonialist with respect to conquistadores and *encomenderos*, but charges him with being an instrument of imperial power. Ibid., 152.


\(^{60}\) The title was actually given by the Regent Cardinal Cisneros. See Castro, *Another Face*, 151.

\(^{61}\) Williams Jr., *The American Indian*, 95.
Las Casas used all tools at hand in his struggle against the colonists’ violence. He even pressured the King, threatening to deny absolution to the conquerors. His multifarious activities included the undertaking of utopian projects in Latin America, the display of polemic skills in the colonial Audiencias and royal courts, the selection of priests to be sent to Latin America, and the exercise of intellectual influence through intensive and extensive activity as a writer. He obtained partial victories, like the issuing of the New Laws in 1542 in order to protect the Latin Americans.

However, some of his achievements were short-lived. Strong opposition in Latin America, which threatened to produce a fracture in the imperial edifice, forced the King to revoke part of the New Laws only three years after their promulgation. His project of introducing Spanish settlers in Latin America ended in fiasco. The whole scheme was based on an illusion, and settlers disagreed with Las Casas about the best way to fulfil Latin America’s golden promise. They had travelled to Latin America to lead and gain profit, not to obey and work. Finally, the evangelization of Mayan territory was problematic too. Mayans were not as peaceful and persuadable of Christian superiority as Las Casas had assumed. Their beliefs were not mere abstract ideas that could be easily dismantled—they were a social construction, inextricably linked to the Mayan way of life. Thus, their disruption entailed the destruction of the foundation of Mayan societies.

Like Vitoria, Las Casas used old sources creatively in order to cope with the new moral dilemmas presented by the Spanish conquest. As part of his eclectic repertoire, he combined theological, moral, and humanitarian arguments with legal reasoning. Presenting his ideas in legal terms was a way of exercising more pressure on the Spanish Crown. A second feature of Las Casas’ writing was his direct knowledge of the conquest. This gave him an advantage over his rivals, whose theories could be dismissed because of their lack of connection with what was actually taking place on the ground. Even Vitoria did not escape criticism for this reason. In the Valladolid debate with Juan Ginés de Sepulveda,

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63 See Hanke, The Spanish Struggle, 17-22. See also Adorno, The Polemics, 75.
65 Ibid.
66 See Elliott, Empires of the Atlantic, 70. Castro talks about cultural onslaught, cultural genocide and cultural subjugation in Another Face, 8, 11, 53-54.
69 Ibid., 160.
he affirmed, referring to Vitoria, that ‘the circumstances that this learned father supposes are false’. 71 Hence, some of Sepulveda’s arguments inspired to a certain extent by Vitoria were rejected because they were ‘based on false information’. 72

The ‘protector of the Indians’ never questioned the legitimacy of the Spanish presence in Latin America. 73 Of all possible just titles, the Pope’s donation for evangelization was the only one that passed his close scrutiny. 74 However, he maintained that the powers conferred to the Spanish Crown in the Bull Inter caetera divinae were not unlimited. The Pope had granted the Spanish Crown lordship over Latin America (dominium jurisdictionis), but not material ownership (dominium rerum). 75 In his opinion, the Latin Americans were to be tribute-paying free vassals of the King of Spain, which would have liberated them from the jurisdiction of the conquerors and allowed them to retain both property and local government. 76 This conception entailed, for example, that everything taken away from the Latin American peoples had to be restituted. 77 Latin Americans’ individual rights stemmed from their collective political rights. 78 Qualified political freedom was the precondition for the exercise of the right to evangelize. 79

Las Casas’ doctrine changed in the last period of his life, under the influence of two events. The first was the accession of Philip II to the Spanish throne in 1554 and the hardening of royal policy in Latin America due to the Spanish economic crises. 80 The second, related to the former, was that the encomenderos of Peru decided to offer 4 million ducats of gold to the King in exchange for perpetual rights over their encomiendas that very same year. The acceptance of this bid would have transformed their descendants into an extremely powerful kind of hereditary nobility. 81 The desperate state of the Spanish treasury made Philip hesitant. After several years of debates—that lasted until 1562—he was

71 Sepúlveda y Las Casas, Apología, §238 376.
72 For Las Casas, Vitoria’s ambiguity stemmed from political expediency. Referring to Vitoria’s just titles for Spanish rule in De Indis, Las Casas asserts: ‘He is a little more careless, however, regarding some of those titles, since he wished to moderate what seemed to the Emperor’s ears to have been harshly said.’ Ibid [translated by author].
73 Pagden, Lords, 52.
74 Hanke, The Spanish Struggle, 153. See also Tierney, The Idea, 280.
75 Ruston, Human Rights, 132.
76 Ibid.
78 Ibid., 28.
79 Ibid., 135.
81 Ibid.
finally convinced of the risk of losing control over such important territories, so he rejected the proposal.  

Awareness of a harsher approach to the Latin Americas and the possibility of an increase of the conquistadores’ power induced Las Casas to further restrict Spanish political power. In his last works, he still derived the Crown’s rights to its overseas territories from the Papal mandate to evangelize, but conditioned it to the Latin Americans’ free acceptance of its rule. Without their consent, the King enjoyed only a right to their kingdoms, but not a right over them. This was the latest elaboration of Las Casas’ lifelong quest for a legal guarantee of the freedom and protection of the Latin Americans within the confines of the power exercised by the Spanish monarchy.

The cornerstone of Las Casas’ defense of Latin American peoples was their portrayal as fully human. Las Casas, as the members of the School of Salamanca, emphasized their rationality and civility—denying, by contrast, the accusation of animality—as a way of claiming the legal parity between the Spaniards and the Latin Americans. Vitoria, for instance, mentioned in De indis the existence of ‘properly organized cities’ and the fact that Latin American societies possessed ‘marriages, magistrates, overlords (domini), laws, industries, and commerce’.

The presence of sophisticated material cultures and sound polities in Latin America was the most conclusive proof of the rational capacity of those who had created them. The attributes of Latin American polities in De indis belonged to a modified list of Aristotle’s requirements for a true civil society. None of them was superfluous. For Europeans, life’s complexity reflected the degree of sophistication of particular societies. It was clear that Latin Americans were not animals and did not live as such. They had transcended nature, using reason as the vehicle to do so. First, the possession of industry allowed them to master the environment and to ascend from a life fused with nature. Once they mastered their natural habitats, they emerged from natural life and created civil communities with all their recognizable features: laws, lords, magistrates, priests, marriages, industry, and commerce.

Las Casas’ portrayal of Latin American societies’ civilized features was more prolific than Vitoria’s. His Apologética Historia was fully dedicated to proving that Latin Americans had achieved full civil life

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82 Ibid., 70-71. Las Casas derived Latin Americans’ consent from the Roman law principle quod omnes tangit ab omnibus tractari et approbari debet, which meant that what concerns all must be dealt with and agreed by all. See Pagden, Lords, 51.
83 Ruston, Human Rights, 172.
84 Ibid.
85 Pagden, Lords, 52.
87 Pagden, The Fall, 68.
88 Ibid., 73.
through a description of their physical surroundings and their moral, cultural, and material accomplishments. Following Aristotle’s criteria of civility, Las Casas demonstrated that Latin Americans possessed prudencia monástica, económica, and política—that is, capacity to govern themselves, their households, and their polities. He concluded that Latin Americans had created sound civil societies. He built that conclusion on an examination of the six types of citizens (peasants, artisans, warriors, rich men, priests and judges, and rulers) that, according to Aristotle, integrated a happy polity. All these social classes were definitely present in the most advanced Latin American societies.

To give more weight to the argument of Latin Americans’ full rationality and capacity to receive the gospel, he complemented the description of their material culture with a detailed account of their natural milieu. His aim was to refute environmental explanations of Latin Americans’ barbarism, derived from theories that linked human backwardness with poor physical environments. As he recognized, only ‘miserable regions’ gave rise to barbarians without ‘proper marriages, nor human commerce’ who ‘lead scattered lives in the woods and mountains alone except for their women, ‘as not only tamed but also wild animals do’. Las Casas never doubted that some humans could resemble wild beasts. He just believed that Latin Americans did not fall into that category. The positive image of Latin American nature that his writing conveyed evidenced that, environmentally deterministic theories of human wilderness and Barbarism, were not applicable to Latin America.

Las Casas described the territories that he visited in his trips to Latin America in superb terms. For example, he depicted Hispaniola as a fertile, happy, and excellent island. He extended that positive characterization to continental areas, which he described as fertile, soft, healthy, happy, and gracious. Even the fields of Latin America—acquiring human attributes—‘laughed’. The quality of the Latin American environment was so good that the worst of its regions surpassed the best provinces of the rest

90 Las Casas, Apologética Historia, Book III Ch CCLXIII 629.
91 Ibid., Book III Ch XLVI 242 and Book III Ch CXCIX 297.
92 This type of environmental determinism is precisely the kind of argument that Sepúlveda used in support of Latin Americans’ natural slavery and barbarism. See Sepúlveda, Tratado, 173 and Sepúlveda y Las Casas, Apología, 61.
93 Sepúlveda y Las Casas, Apología, 128 [as translated in Pagden, The Fall, 132].
94 Las Casas, Apologética Historia, Vol I Book I Ch XX 95-96.
95 Ibid., Vol I Book I Ch XXI 105. See also Ibid., Vol II Book III Ch CCLXIII 629.
96 Ibid.
of the world. In *Historia de las Indias*, Las Casas went as far as comparing Latin American nature to the Garden of Eden. Uncertain of its exact situation, he nevertheless did not hesitate to emphasize the

Regarding the suspicion that the Earthly Paradise could be located in that region, the Admiral was not wrong, considering the novelties and changes he found, mainly the softness and mildness of the air, the freshness, greenness and beauty of the forests, the gracious and happy disposition of the land each piece and part of which seems a Paradise; the abundance and impetuous grandiosity of so much fresh water...

This comparison was not exceptional. Latin American nature was also portrayed as a paradise in the *Short Account of the Destruction of the Indies*. In spite of the fact that he did not explicitly mention the word paradise, his description suggested it. For instance, Puerto Rico and Jamaica were described as ‘lands flowing with milk and honey’.

Las Casas’ idyllic description of Latin America paralleled the depiction of its inhabitants. In fact, the fertility of the former suggested the kind disposition of the latter. In Las Casas, Latin Americans are depicted as living an ideal form of primitivism. Notwithstanding an abundant nature, Latin Americans did not live in a natural state. Their copious and temperate environment definitely housed advanced peoples.

The idealization of Latin American nature also emphasized, by contrast, the horrors of the Spanish conquest. Destruction was more intolerable when contrasted with the preciousness of what was being destroyed. Finally, the ideal portrait of Latin America had a religious purpose as well. Describing the continent as a paradise on Earth, Las Casas was more convincing in his assumption that its population was fit to receive the Gospel. How could creatures that inhabited what resembled the Garden of Eden be unwilling to receive and accept the word of God?

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97 Ibid.
100 Ibid., 26.
101 Vitoria also acknowledged the fertility of the Latin American environment. He asserted that: ‘Also God and nature are not wanting in the supply of what is necessary in great measure for the race.’ Vitoria, *De indis*, Sect I§23 127.
104 Ibid.
105 This association is evident in the Dominican’s reference to Yucatán, which he compared to the paradise. See Las Casas, *A Short Account*, 71.
Unlike most of their contemporaries, Vitoria and Las Casas lifted Latin Americans from a condition of assimilation with nature, apparently equaling them to the Spaniards. This was essential for their inclusion in the same religious, political, and legal community. Only then could *ius gentium* and its language of rights be deployed, with all their regulative power. The inclusion of the Latin Americans in the human family was the prerequisite for the universal character of the rights that Vitoria and Las Casas defined as applicable to all commonwealths and peoples.

Despite rejecting the idea of a kind of ‘state of nature’ in Latin America, Vitoria and Las Casas adopted the same assumptions about the relationship between the social and natural environmental spheres as those whom they wished to contest. They too considered nature and civility as opposites, and applied the latter term to define the condition of the colonial subject. Human equality was achieved at the expenses of drawing a clear-cut line between humanity and non-human nature, thus entirely separating the social and natural spheres. Vitoria and Las Casas understood and expressed that division in hierarchical terms. The difference with other authors was that they placed Latin Americans in the social/human and not the natural/animal side of the divide. Vitoria’s consideration of nature was not much higher than writers such as Sepúlveda. It was precisely the low status of animals that made Latin Americans’ civility shine by contrast.

The separation between the natural and social realms and the subordination of the former to the latter, were at odds with Latin Americans’ worldviews. As a result, while defending the status of Latin American societies, Vitoria and Las Casas were inadvertently introducing an understanding of the environment completely alien to that of the myriad societies they tried to protect. Their defense was based on emphasizing the traits that the Spaniards regarded as sophisticated and undermining those that they deemed barbaric, irrespectively of Latin Americans’ opinion about their own practices.

In addition, ironically, the affirmation of Latin Americans’ capacity to master nature hindered their relationship with the environment in a very concrete sense. Vitoria’s and Las Casas’ universalism was instrumental to a certain extent. For them, Latin American and Spanish equality stemmed from the fact that God had created them equally able to receive the Christian faith. The privileged status that Latin

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107 They still disagreed about the implications of that superiority. See the *supra* discussion at page 104.
109 This was especially true of Las Casas. See Seed, ‘Are these Not’, 639.
Americans enjoyed in their theories rested on their religious assimilation by the Spaniards and their condition as possible converts. Eventually, in the religious environment of the counter-reform, Latin Americans’ approach to nature, which entailed talking to animals and worshiping living creatures, was considered idolatrous. Continuing these practices risked accusations of heresy and even execution.110

The cosmopolitanism of Las Casas and the School of Salamanca was tainted by religious bias because they based human egalitarianism on the capacity to adhere to a particular creed.111 In this sense, Ruston affirms that ‘Las Casas was not arguing as a political theorist, but as an evangelizing bishop, and his conviction that the gospel has to be received freely, without any type of coercion was the origin of all he has to say about political liberty’.112

For Las Casas, the main attribute of the Latin American peoples was their resemblance to Christians.113 To be sure, his archetype was not the greedy conquistadores who wrongly called themselves Christians, but those who, as with the Latin Americans, followed the dictates of evangelical poverty so highly appreciated by the Dominican Order.114 Latin Americans were trapped by an egalitarian logic that did not differentiate between humans, thereby erasing their particularities, or rather applying a given particularity in disguise. Apparent equality became a barrier for real knowledge of the myriad diverse societies that populated Latin America, and their ways of interpreting the world. As Todorov has remarked: ‘If it is incontestable that the prejudice of superiority is an obstacle in the road to knowledge,

110 Latin Americans’ wellbeing was not impaired during the first phase of evangelization, characterized by a spirit of optimism and even euphoria about the possibilities of success in conversing Latin American peoples. During this period, Latin Americans generally received a benevolent treatment. At the end of the sixteenth century, though, there was mounting evidence that Latin Americans continued practicing pagan rites in secret. In the new spirit of the Counter-reform sponsored by the Crown, keeping the purity of the faith was of utmost importance. By the time of the third Mexican Council it was clear that Latin Americans’ nature was imperfect and, thus, needed to be governed by fear rather than love. The paternalistic approach was substituted with distrust. See Rawlins, Church, 110. See also, John H. Elliott, ‘The Discovery of Latin America and the Discovery of Man’ in John H. Elliott, Spain and its World, 1500-1700: Selected Essays (New Haven, Yale University Press, 1989) 42-64, 51.

111 Todorov, The Conquest, 162. Similarly, Ruston affirms that: ‘…for Las Casas…all the rights of the Indians…derive from the fact that … they are capable … of hearing and receiving the gospel’. See Ruston, Human Rights, 129. And Keal remarks that: ‘In the case of the Amerindian other this lack of Christianity justified the use of force by Europeans. It also supported the view that Amerindians were barbarians and hence to be treated as natural slaves, which … was opposed by Las Casas and Vitoria. But at the same time as they lacked Christianity the Amerindians were nevertheless potential Christians. This meant in turn that what made Indians different was recognized and evaluated from the standpoint of an implicit and unquestionable standard. That standard was European.’ See Paul Keal, European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society (Cambridge, Cambridge University Press, 2003) 65.

112 Ibid., 135.

113 Todorov, The Conquest, 163. This is rather important because in fact many of the limitations imposed by Las Casas’ resulted from the fact that he could not conceive of Latin American peoples rejecting the Gospel if taught with persuasion.

114 Brading, The First America, 74.
we must also admit that the prejudice of equality is still a greater one, for it consists on identifying the other purely and simply with one’s own “ego ideal” (or with oneself).\footnote{115}

One of the shortcomings of applying a homogenizing reasoning was that the voice, perspectives, and worldviews of Latin American peoples, which included their particular understanding of nature and the way to relate to it, were ultimately displaced by more imperative European goals.\footnote{116} Once the appearance of equality based on the denial of difference entered the language of rights, the imperializing tendencies of \textit{ius gentium} (as formulated by Vitoria) and universal rights (as conceived by Las Casas) started to play out.\footnote{117} While protecting Latin Americans to a certain extent within the new colonial society, they also made it more difficult to find a conceptual vocabulary for them to rebel against and ultimately break away from its economic, political, social, religious, and cultural imperialistic traits.

The application of a universal legality based on a concrete understanding of nature erased alternative conceptions. Even if there were common elements in the way Spaniards and Latin Americans approached nature, Vitoria and Las Casas could not grasp the specific way in which Latin Americans’ social life was still embedded in the natural world. The economic rights enunciated in the law of nations were based on the conception of nature as a commoditized material entity. The strict conceptual distinction between nature and civility reinforced this vision. Property rights gave a concrete power over nature, the exercise of which affirmed the superiority of those who could master and transform the environment.

Las Casas’ insistence on Latin Americans’ consent to Spanish rule was remarkable. It opened up the possibility for their relative freedom. Despite this concrete gain, however, their cultures and beliefs nonetheless receded when confronted with the universal religious logic that legitimized Spanish colonization. This was not exclusively down to Vitoria or Las Casas, but the “by-product of a discourse of conquest enforcing a vision of the world focused on one right way of life for all humankind”,\footnote{118} which included only one right way to relate to the environment.

\textit{Difference among ‘equals’: assessing Latin Americans’ social status}

The economic activities, material culture, and political institutions of Latin American peoples were living evidence of the fact that they had already overcome the ‘state of nature’ when the Spanish first arrived

115 Todorov, \textit{The Conquest}, 165.
116 Williams Jr., \textit{The American Indian}, 95.
118 Williams Jr., \textit{The American Indian}, 96.
to the continent. The relevant question, then, was whether their social achievements stood in parity with those of the Spanish. If both populations were at the same or even similar level of social advancement, the imposition of external religious, economic, social, cultural, or political standards was difficult to justify. Moreover, the question of how advanced and progressive peoples could adopt a faith other than Christianity remained. For the religious scholars of the period, this possibility was counterintuitive because Christianity was the most definite feature of a sophisticated society. Hence, to fit the Spanish religious scheme, Latin Americans had to exist in an intermediate grey zone between the ‘state of nature’ and full civility, the only space where evangelization was possible.

For the Spanish scholastics, the transition from ‘the state of integral nature’\(^{119}\) to the ‘state of nature’ was a defining moment of human history. During the ‘state of innocence’,\(^{120}\) immaculate humans enjoyed the rewards of a plentiful nature that effortlessly satisfied all necessities.\(^{121}\) Things change after the Fall, when humanity became tainted by the original sin. The same disobedience that condemned humanity also corrupted nature. As a result, it lost its spontaneous fertility.\(^{122}\) Soto interpreted this transformation as an act of rebellion against humanity in retaliation for their offence to God.\(^{123}\) Following St Thomas, Las Casas too believed that human mastery over nature had diminished as a consequence of the original sin.\(^{124}\)

Only through hard work,\(^{125}\) industry, and the creation of a Christian civil society could humans recover their ascendency over the natural world and recreate—if imperfectly—God’s paradise on earth; hence, coming full circle.\(^{126}\) Achieving social complexity demanded taming, utilizing, and exploiting nature. It is important to recall that Vitoria and the School of Salamanca situated the emergence of the institution of private property at precisely that moment. The privatization of the world’s resources was then naturally understood as part of a progressive path toward the perfection (understood as Christianization) of humanity. For Soto one of the reasons for the division of common property was precisely the avoidance

\(^{119}\) This is one of the expressions used by the School of Salamanca. See López, ‘Propiedad’, 83.

\(^{120}\) Ibid.

\(^{121}\) The fertility of nature after God’s creation parallels its description in Roman Golden Age narratives. See Garnsey, *Thinking*, 121-122.

\(^{122}\) See also López, ‘Propiedad’, 84-85.

\(^{123}\) Soto, *De iustitia*, Book IV, 3.1, 296.


\(^{125}\) Ibid., *De iustitia*, Book IV, 3.1, 296.

\(^{126}\) As Pagden has footnoted: ‘… only when the spiritual and cultural world of man had, through conversion to Christianity, reached the same degree of perfection and unification as the biological world, would man finally be able to achieve his telos and earn release from his earthly labors.’ Pagden, *The Fall*, 19.
of laziness and passivity.\textsuperscript{127} Agricultural progress could only be achieved by mobilizing individuals’ longing of and love for what belonged to them.\textsuperscript{128}

The perceived inferiority of Latin American societies meant that their place above a condition of quasi-assimilation with nature—to which authors such as Sepúlveda condemned them—could not be exactly the same as that of the Spaniards. It had to be somehow incomplete. Moreover, the heterogeneity of Latin American societies complicated any general categorization about their level of social sophistication. As Las Casas recognized, the same territory, Florida, could house both civilized and barbarian groups.\textsuperscript{129} Thus there was a need for a theory that explained the difference within Latin American societies and between the colonies and the metropolis. How could \textit{ius gentium} and the common rights of humanity preserve their universality while making room for the particularity of those to whom the law applied as members of the same legal community?

At the end of his lecture, Vitoria introduced a final title for Spanish dominion based on Latin Americans’ lack of intelligence and their limited capacity to govern and administer their territories—a title that echoed the doubts that contemporary commentators of Vitoria had about Latin Americans’ civil capacity.\textsuperscript{130} Latin Americans’ inferiority was for Vitoria a ground for Spanish power that he neither dared to affirm nor entirely condemn;\textsuperscript{131} in other words, it could ‘provide legal grounds for subjecting the Indians’.\textsuperscript{132} Vitoria did not deny the fact that their commonwealths had legal, social, and political institutions. He was just unsure about their proper quality.\textsuperscript{133} His hesitation in regard to this title suggests that, for him, Latin Americans had not yet fully emerged from the natural state.

The deficiency of Latin Americans’ agricultural systems was one of the elements whereby Vitoria explained the inferiority of their societies.\textsuperscript{134} Their inability to master the environment and make the land productive made them more dependent upon nature. For Europeans, agriculture was the supreme mode of converting nature’s potential into actuality.\textsuperscript{135} Husbandry was indispensable for the constitution of a civil society, solely within which a refined social life was possible. A sound system of land cultivation

\begin{itemize}
\item \textsuperscript{127} Soto, \textit{De iustitia}, Book IV, 3.1, 296-297. See also Ibid., Book III, 1.3, 196. The other reason was the preservation of peace, Ibid.
\item \textsuperscript{128} Ibid., Book IV, 3.1, 296-297.
\item \textsuperscript{129} Las Casas, \textit{Apologética Historia}, Vol II Book III Ch CCVI 357- Ch CCVIII 370.
\item \textsuperscript{130} Vitoria, ‘On the Latin American Indians’, 3.8 §18 290.
\item \textsuperscript{131} Ibid.
\item \textsuperscript{132} Ibid., 1.6-concl. §23 251.
\item \textsuperscript{133} Ibid., 3.8 §18 290.
\item \textsuperscript{134} He affirmed that the peoples of Latin America lacked ‘systematic agriculture’. Ibid.
\item \textsuperscript{135} Europeans believed, as Pagden puts it, that: ‘The hunters and the gatherers merely foraged on the surface of the planet.’ See Pagden, \textit{The Fall}, 91.
\end{itemize}
generated the surplus necessary to free parts of the community to engage in the enlightened activities indispensable to achieve social progress. Without proper agriculture, Latin Americans’ complete evolution was not possible. Another deficiency related to Latin Americans was the imperfection of their arts and crafts, that is, the knowledge to create the artefacts and tools to dominate and transform the environment. Furthermore, Latin Americans did not have manufactures or the capacity to transform nature’s products into derivative commodities through human industry. Technology, industry, and proper agriculture were indispensable features for sound civil life.

Another proof that Latin Americans were close to the ‘state of nature’ was their comparison with the Spanish peasantry. Latin Americans, Vitoria stated, seemed ‘insensate and slow-witted’ because of their ‘evil and barbarous education’. That was not completely exceptional, Vitoria continued, as even ‘amongst ourselves we see many peasants (rustici) who are little different from brute animals’. Latin Americans were to the Spanish what the Spanish peasants were to their town dwelling countrymen. Life in the countryside was closer and more dependent on nature: more brutish, ignorant, and less polished than the type of existence that was possible in the city. This statement about the deficient nature of Latin Americans’ rationality has to be read in light of Victoria’s earlier characterization of the Latin Americans as ‘cowardly, foolish, and ignorant’ in his discussion about the first just title based on human natural partnership and communication. Notwithstanding their comparison with animals (by their association with peasants), Latin Americans possessed, like Spanish peasants, full potential for improvement.

In Vitoria’s scholarship, cultural difference was not the manifestation of an unbridgeable gap between the Spanish and the Latin Americans that rested on the latter’s deficiency. On the contrary, colonizer and colonized were united by their capacity for progress. In consequence, the difference between both social groups lay in the degree of fulfilment of that potential. Whereas the former had reached their apex, the latter had not yet entirely evolved because of an educational deficit. So, the civilizing effect of Spanish presence in Latin America became irresistible. Latin Americans’ incompleteness would disappear once they were exposed to the influence of the superior Hispanic commonwealth. If the Spanish proceeded...

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136 Pagden considers the absence of iron as the reason that convinced most commentators about Latin Americans’ inability to progress by themselves. Ibid.


138 Ibid., 1.6 §23 250.

139 Ibid.

140 Ibid., 3.1 §6 282. In Pagden and Lawrence, the Latin Americans are characterized as ‘cowardly, foolish and ignorant’. See Vitoria, ‘On the Latin American Indians’, 3.1 §6 282.
gently within the (ample) margins of the rights granted by Vitoria, they could be the tutors of the Latin Americans while acquiring a big part of their natural resources.

It is important to notice that Vitoria did not fully endorse Latin Americans’ inferiority. Basing Spanish rights on such a justification was unnecessary, as he had already presented several legal grounds to legitimize Spanish power and property in Latin America. Moreover, using the deficient nature of the Latin Americans as an argument for Spanish imperial rule was risky. Even the Spanish participants in colonial debates could not find a common position on the issue. Therefore, it was possible that rival nations would regard any justification of Spanish rule based on the personal characteristics of the colonized population as a biased attempt at domination. In comparison, Vitoria’s international legality offered a more neutrally robust legitimization of conquest.

Why did he still utter his doubts about the quality of Latin Americans’ commonwealths and the nature of their inhabitants? One possibility is that he wanted to convince his audience about the convenience of the economic rights that were part of ius gentium. After all, the legality of the conquest did not equate to its morality. And as the duda Indiana (the doubts about the legitimacy of Spanish presence in Latin America) gained notoriety, the ethical dimension of the conquest became more relevant than its legality. The imperfectness of Latin Americans’ societies and political systems together with the Spanish capacity to perfect them made the latter’s power in Latin America seem necessary. Evangelization was part of a larger project of social restructuring. By the same token, transferring vacant natural resources to those who could better exploit them was not only in line with ius gentium, but was also the most natural course regarding the Christian mission of taming the Earth. Latin Americans’ inferiority in mastering nature gave Spanish economic rights an environmental purpose. Vitoria never put all these elements together, but their unconnected presence in his lecture on De indis conveys the impression that the Spanish had a superior civil capacity, and hence a greater capacity to master nature.

Las Casas’ idealized account of the peoples and societies he found in Latin America shared some parallels with Vitoria’s. For example, agriculture was for him too intimately connected with social amelioration. Thus, he criticized the destruction of agricultural landscapes by the Spanish conquistadores in the Kingdom of New Granada because it turned a ‘fertile and populated area’ into a ‘scorched wasteland’. Without ‘native people left to work the land’ the whole area of New Granada would soon turn, he argued, into ‘one vast empty desert’. Likewise, he complained about the devastation of ‘vast

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141 Luciano Pereña, La Idea de Justicia en la Conquista de América (Madrid, Mapfre, 1992) 53.
142 Las Casas, A Short Account 100.
143 Ibid., 123.
and prosperous areas’ turned ‘into a wilderness’. Wilderness was the reverse of civilization, a vacuum, an empty place where religion and government—the elements that Spanish commentators generally associated with the idea of human advancement—were ‘unknown’.

One should not rush to the conclusion that Las Casas’ perception of wild nature was negative. In fact, the contrary seems true in the History of the Indies, where he praised rivers, forests, hills, and other natural elements. This notwithstanding, no matter how edenic Latin American environment seemed at first glance, it was also to a certain extent incomplete. Only by cultivating the Earth would nature reach its perfection. After the Fall, agriculture had become the chief way whereby humanity could improve its condition. In consequence, the apparent contradiction between Las Casas positive and negative consideration of Latin America’s untamed landscapes disappears. In spite of his superlative description of nature before cultivation, once this activity was undertaken, its demise, which hindered the advancement of Latin Americans’ commonwealths, represented a drawback. Agriculture was the foundation of a proper civil society. Its destruction gave rise to social backwardness and wilderness— their antithesis.

The presence of agricultural systems in Latin America was for Las Casas one of the elements that proved Latin Americans had transcended the condition of quasi-fusion with nature. Their capacity to produce food and govern themselves evidenced the existence of a proper system of administration of their polities. However, despite Latin Americans’ capacity for civil life, Las Casas never doubted that Latin Americans were barbarians in a certain linguistic sense. This limitation did not affect their ability for interpersonal communication. Otherwise, the formation of sound polities as those that Las Casas described in his works on Spanish America would have not been possible. Although Latin Americans had a ‘legitimate, just and natural government’, they still lacked ‘the arts and exercise of letters’. Without these skills they could not accumulate and transmit knowledge about their surroundings. In the words of Pagden, for Las Casas, the element that was missing from Latin American cultures was science, or the vehicle for a correct ‘understanding of and power to control nature’.

144 Ibid.
145 Las Casas defined wilderness as a space where ‘respect for God and the King were unknown’. Ibid.
146 See, for instance, Las Casas, Apologética Historia, Vol I Book III Ch LIX 306—Book III Ch LX 315.
148 Sepúlveda y Las Casas, Apologia, §21, 134.
149 Pagden, The Fall, 130.
The comparison of Latin America with paradise (a repeated feature of Las Casas’ description of Latin American nature) leaves precisely the impression that nature had been barely modelled by the human hand. As mentioned above, Las Casas stated that ‘milk and honey’ spontaneously emanated from the lands of Puerto Rico and Jamaica, instead of stemming from the ingenuity and skillfulness of its inhabitants.\footnote{Ibid.} Contrastingly, he praised the technical capacity of the peoples of Perú for building sophisticated irrigation systems.\footnote{Las Casas, \textit{Apologetica Historia}, Vol I Book III Ch LX 312.} However, he also footnoted that Latin American territories were so rich that with little effort Latin Americans got abundant provisions.\footnote{Ibid., Vol I Book III Ch LIX 308.} Latin Americans’ ability to thoroughly transform their environment was for Las Casas limited, not always because they lacked the knowledge and instruments to exploit nature, but also because nature was so abundant that their needs were satisfied with less human agency.

But there were certain Latin American societies whose capacity to progressively transform natural ecosystems was questionable. The deficiency of Latin Americans’ material culture was more pronounced in some tribes of Florida that had no agriculture.\footnote{Ibid., Vol II Book III Ch CCVI 357.} Although Las Casas described their mores as barbarian, he was aware that placing them close to the ‘state of nature’ was perilous, as their inferiority could be interpreted as a question of kind rather than degree and, hence, used to their detriment. This is why he was careful to stress the transitory nature of Latin Americans’ lack of social progress and mastery over nature. That way, the possibility of conversion to Christianity and the achievement of full civility was left untouched.

In the \textit{Apologetica}, Las Casas’ idea of Latin Americans’ improvement was slightly different from Vitoria’s. Whereas the latter conceived it as the actualization of what was merely potential, and hence related it to human nature, the former understood that actualization as a historical process in which whole societies were implicated. Las Casas was thus able to compare different nations at different historical junctures. Latin Americans, as other peoples, possessed the seeds for true religion, virtue, and scientific knowledge.\footnote{Ibid., Vol II Book III Ch CCVI 357.} But some of them had stagnated and were far from realizing that potential. So, for example, Las Casas affirmed that the barbarians of Florida lived in the ‘first and rudimentary stage’ in which the Spanish and other peoples were at the time when humanity first occupied the earth.\footnote{Ibid., Vol II Book III Ch CLXXXVI 258.} Illustrious nations
such as the Romans, Greeks, and even the Spaniards were not so long ago much different from Latin Americans.

Las Casas classical work, *Apologética Historia*, is full of passages that compare the social and cultural achievements of Latin Americans to those of older civilizations like the Romans, Greeks, Egyptians, etc. A timeline runs throughout the whole book, allowing the drawing of analogies between different historical periods on account of their degree of social sophistication. The progress of the Latin Americans had just been delayed by historical factors. As a result, the evangelizing mission acquired historical necessity. The arrival of the Spanish had brought Latin American history back into mainstream human history.

In his social-evolutionary scheme, Las Casas distinguished various phases of civilization. In the first period, humans lived in a condition akin to the ‘state of nature’. This kind of periodization is also used in the Prologue of *Historia de las Indias*. At the time, existence was basic, wild, unsocial, and ignorant; there was no law, order, industry, human habitation, nor agriculture. He acknowledged that Latin American societies had, as other nations, lived in that condition in the past. Some, like the barbarians of Florida, still remained in that early age of human history. Most, however, had emerged from that state, acquiring consciousness of their human status and an awareness of its particular relationship with nature. Once society started to separate from and rise over nature, life’s complexity increased progressively, until reaching the threshold of the last epoch. This was the stage in which most Latin Americans lived before conquest—they had made the most of their potential as pagans. Their evolution demanded a last leap toward progress through conversion to Christianity, which opened full access to science and the exploitation of nature.

According to Las Casas, change from barbarism to civility demanded the involvement of a prudent wise man that could guide backward societies toward political life and knowledge of God through love,

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156 See, for instance, ibid., Vol I Book III Ch CXXVII 664; Vol II Book III Ch CXLII 39; ibid., 42; Vol II Book III Ch CXCIV 296 and Vol II Book III Ch CCLXII 624.
157 Las Casas describes this condition in the chapter that he dedicates to ‘wild and solitary men’. See Ibid., Vol I Book III Ch XLVII 248-255.
160 Ibid., 250.
161 Ibid., Vol I Book III Ch XLII 220.
162 According to Pagden: ‘For Las Casas, no less than for Vitoria, culture is primarily the medium through which men learn to exploit the God-given potential in nature.’ Pagden, *The Fall*, 142.
163 According to Las Casas, ‘All the peoples of the world are human, and the definition of all and every human is that they are rational; … they all have the natural principles and potential capacity to understand and comprehend the sciences and the things they ignore.’ Las Casas, *Apologética Historia*, Vol I Book III Ch XLVIII 257-258 [translated by author]
peace, and discretion. This had actually happened at the outset of human history, as both Cicero and Plutarch recalled. Humans lived close to nature until a more knowledgeable insider or outsider led their transition to civility. Las Casas gave historical examples of wise men such as Saturno or Lisanias—trendsetters of Italian and Athenian social improvement, respectively.

Before the Spanish came to Latin America, no ‘man’ within Latin American societies had taken on the burdensome task of stimulating endogenous change. It is difficult to imagine, in the context of the Spanish conquest, a more suitable figure than Las Casas to incarnate the virtues of love, wisdom, and good sense required to approach Latin Americans, convert them, and generate social change. It is likely that Las Casas had envisioned his role in Latin America in these grandiose terms. This might explain in part the extraordinary energy and zeal with which he stood up for the rights of Latin Americans. He might have conceived himself not only as the mediator between the Spanish Crown and the Latin Americans, or the apostle of Christ, but also an agent of human history, an incarnation of the progress inherent to the evangelizing mission he so fervently advocated. Las Casas spoke and wrote for his contemporary audience as much as for perpetuity.

The presence of Las Casas and his compatriots in Latin America was the catalyst for the evangelizing mission, which had a secular educational aspect. Latin Americans’ social evolution meant Hispanisation, a process that implicated the peaceful transformation of both Latin Americans’ souls and their habitats. The link between the two aspects of the evangelizing mission, the social and the environmental, is evident in a remarkable passage in which Las Casas compares wild people and uncultivated nature while acknowledging the possibility of molding them both so as to actualize their inner potential. After having affirmed the unity of the human lineage, he conceded that there remained in the world ‘wild men … who are like uncultivated land that produces weeds and useless thorns, but has within itself so much natural virtue that cultivating and farming it gives domesticated, healthy and useful

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164 Ibid., Vol I Book III Ch XLVII 248-249.
165 Ibid., 249. See also Las Casas, Historia, Vol I Pról. 15-16.
166 Las Casas, Apologética Historia, Vol I Book III Ch XLVII 250.
167 Ibid., 252-253; 256.
168 Pagden has footnoted that Las Casas often claimed a unique and privileged knowledge of the facts of the case of Latin America, a knowledge that situated him over all other missionaries. See Anthony Pagden, ‘Ius et Factum: Text and Experience in the Writings of Bartolomé de Las Casas’ in Pagden, The Uncertainties of Empire, 143-162, 153. Las Casas is also viewed in magnificent terms by his colleague Bartolomé de la Vega in his introductory letter to Las Casas arguments in Valladolid. For de la Vega, Las Casas was the foremost of Latin Americans’ defenders, and ought to be revered in accordance with his privileged status. See Fray Bartolomé de la Vega, ‘Carta-Introductoria de Fr. Bartolomé de la Vega’ in Sepúlveda and Las Casas, Apología, 101-103.
169 As Vitoria had affirmed, Latin Americans lack of intelligence stemmed from their bad and barbarous education. See Vitoria, ‘De indis’, Sect I §23 128.
products’. In consequence, even backward peoples like some of the inhabitants of Florida were reducible to ‘order and reason’.

In Vitoria’s thinking, Latin Americans’ backwardness called for Spanish political and economic authority. Las Casas had a different approach to the Spanish mission in Latin America. For him, colonization could proceed through example, collaboration, and cohabitation. Vitoria believed that superior Spanish beliefs and customs had to be—if gently—imposed through the right to preach. The ‘defender of the Indians’ imagined instead a kind of osmosis, a process of impregnation of the lower by the higher culture until the final absorption (or assimilation) of the former into the latter. This is why Las Casas felt so distressed about the conquerors’ greed. Their avarice spoiled the possibility of attaining peace and redeeming the Latin Americans. Their violence rendered his grand plan delusive. Consequently, the more impracticable his ideas turned out to be in practice, the more he tried to restrict the conquerors’ power and authority in Latin America, and the more he scrutinized and criticized their actions. But, importantly, he never limited the power of the Church and its proselytizing role.

The limitations he imposed on Spanish power not only stemmed from a conviction about the importance of Latin Americans’ freedom per se. Total freedom became necessary only because of the conquistadores’ manifest incapacity to embrace Las Casas’ particular vision of a gentle Empire. Before he became convinced of their lack of interest for anything but fast wealth, he had tested his ideas through two settling schemes in Latin America.

The first of these two projects consisted of sending Spanish farmers to the Indies to cultivate Latin American soils. The few that finally ventured to Latin America faced hardship upon their arrival. Many fell ill and died, and the result was a total fiasco. Nevertheless, the resolute Las Casas was not discouraged, and his insistence was rewarded with a land concession established at Cumaná, in what is today Venezuela. He believed that in a territory under his personal control and supervision Spanish peasants and Latin American villages could coexist side by side. Besides, the economic success of his

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170 See supra footnote 1. See also Las Casas, Historia, Prél. 16.
171 Las Casas, Apologética Historia, Vol Book III Ch XLVIII 260.
172 Las Casas’ were not the only utopian settlement projects in Latin America. Years later the Jesuits created the famous Reducciones in the southern cone of South Latin America, where they lived among and preached to the Guarani. What for Ordoñez constituted a ‘different kind of modernity/coloniality’ was based on a model of peaceful evangelization and notions of technical and scientific development of Latin American nations similar to those of Las Casas. It is fair to acknowledge, nonetheless, that the Jesuits did their utmost to avoid imposing a foreign cultural model on the Guarani population. The missions, for example, worked as cooperatives, combining private and communal property and redistributing surpluses among its members. See Fernando Ordoñez, ‘Reason and Utopia at the Imperial Borders: Modernity/Coloniality in the Jesuits’ Reducciones in Paraguay’ in David R. Castillo and Massimo Lollini (eds.), Reason and its Others: Italy, Spain and the New World (Nashville, Vanderbilt University Press, 2006) 296-315.
venture would demonstrate that the encomienda was unnecessary. Unfortunately for Las Casas, reality proved bitter again. Spanish conquistadores and Latin Americans were already immersed in a spiral of violence when Las Casas reached his destination, which he was unable to end. Even worse, in their obsession for fast riches, the farmers that Las Casas had recruited had terrorized the Latin Americans.

The two failed attempts of peaceful colonization show Las Casas’ association of social progress with the colonization and civilization of nature. For Hanke:

The vision which guided Las Casas was of a new World in which Spanish farmers—transplanted with tools, seeds and supplies furnished by the King; their native industry, farming ability, and firmness in the faith being their own contribution—would take root in Latin America. They would till the soil of Tierra Firme and live side by side with the Indians there in such a way that their faith and their skill and industry would insensibly be absorbed by the natives, and an ideal Christian community would come into being.173

In this utopian effort to promote the improvement of Latin Americans’ commonwealths through agriculture, Las Casas was not different from his admired wise men who had at other historical junctures helped nations move forward. Far back in history before Las Casas conceived his agricultural schemes, there were concrete examples of similar approaches to social change from which he drew inspiration. As Las Casas recalled, Saturno, the father of the Italian nation, for instance, had taught Italians how to till the land and seed and collect agricultural products as part of his mission to promote their advancement.174 Likewise, Zechio Croatino showed the inhabitants of Bohemia how to cultivate the land, helping their ascension from an almost bestial condition to a political and reasonable life.175

Eventually, Las Casas abandoned his initial plan, due to the conquistadores’ immoral conduct rather than a change of perspective. Years later, once he had already set strenuous limits on Spanish power in Latin America in his last works, he referred to the Yucatán as a place where his utopia could have been realized. There, Spanish could have built towns and cities, mingling with the original population. And so, ‘the local people might have lived side by side in peace and prosperity with the Spanish, who would then have found themselves, had they only proved worthy, in a paradise on earth’.176 It was the Spanish conquerors’

175 Ibid., Vol I Book III Ch XLVIII 257.
176 Las Casas, *A Short Account*, 71.
unworthiness, not Latin Americans’ inherent freedom, that convinced Las Casas about the dangers of granting economic rights and political power to the Spanish adventurers.

José de Acosta: a reappraisal of Latin American social progress

Las Casas’ ethnographic description of Latin American commonwealths found a replica in the writings of the Jesuit José de Acosta (1540-1600). In a similar vein to Las Casas’ Apologética, Acosta studied the natural and social dimensions of life in Latin America in his famous book Historia Natural y Moral de las Indias.177 Published in 1590 and available in English since the early 1600s, Acosta’s description of Latin American societies soon became influential. In contrast, Las Casas’ Historia de las Indias and Apologética Historia Sumaria remained unpublished until the nineteenth century, so his impact on posterior authors who reflected on the ‘matters of the Indies’ was not as significant as that of Acosta. In fact, it was Acosta’s perspective on the character of the Latin Americans’ habitats and commonwealths that gained notoriety at the end of the sixteenth century and continued to exercise an influence on speculations about the nature of Latin American societies for most of the seventeenth century.178 His doctrines were particularly influential in colonial debates about the nature of North American peoples in the English colony of Virginia.179

The purpose of Acosta’s Historia was twofold. On the one hand, he believed that it was interesting and pleasant to describe the qualities of ‘nations’ that were ‘in many ways different from our Europe’.180 Curiosity was a strong motivation for knowledge. On the other hand, as a Jesuit (a Spanish order that had gained conspicuous intellectual and missionary influence at the end of sixteenth century), Acosta felt compelled to study Latin Americans’ mores and manners as a way of facilitating missionary work. He thought that the more the Spanish familiarized with the way in which Latin Americans lived, the easier it would be to win their trust so that they could be peacefully converted to Catholicism.181 In the Historia we find the same humane tone that is characteristic of Vitoria’s, Soto’s, and Las Casas’ writings on the Latin American peoples.

178 Pagden, The Fall, 146.
179 As Fitzmaurice has footnoted: ‘In the years after the foundation of Jamestown, Acosta Historiae was cited on matters of nature and custom in ways which supported his theory of progressive barbarism.’ See Fitzmaurice, Sovereignty, 78.
180 Acosta, Natural and Moral History, Book VII Ch I, 380.
181 Ibid.
Like these authors, Acosta wanted to rebut the devious idea that Latin Americans were brutes and beasts. He explained that one of the reasons to write about them, their ‘customs and polity and government’, was to ‘refute the false opinion that is commonly held about them, that they are brutes and bestial folks…’\textsuperscript{182} For him, Latin American commonwealths exhibited contradictory tendencies of barbarism and sophistication.\textsuperscript{183} It was the second aspect, of course, that he found worthy of reflection. Similar to the ‘gentle Dominicans’, the conclusion of the Jesuit was that Latin Americans were rational beings and, hence, ‘had a natural capacity to receive good instruction’\textsuperscript{184}.

But Acosta was also convinced that Latin Americans were inferior to the Spanish.\textsuperscript{185} They lacked the use of letters, the mechanism whereby humans could better understand and shape their reality.\textsuperscript{186} Importantly, this difference was for him a question of degree rather than kind. Therefore, he placed Latin Americans and the Spanish in a continuum. In his words: ‘There are no peoples so barbaric that they do not have something worthy of praise, nor are there any people so civilized and humane that they stand in no need of correction.’\textsuperscript{187}

Acosta acknowledged that there was an important degree of differentiation among Latin American commonwealths. In his work \textit{De procuranda indorum salute}, which first appeared in Salamanca in 1588 (two years before \textit{Historia}), he affirmed that there was no one sole way of educating, evangelizing, and governing the plurality of Latin American peoples.\textsuperscript{188} He thus came up with a three-fold general classification of different kinds of barbarism within which he could comprehend and order the whole world.

People who only slightly deviated from the dictates of right reason and the general practices of humankind formed the first category of barbarians.\textsuperscript{189} Their societies possessed several traits that were familiar to Acosta’s own social context: they had sound government, proper laws, fortified cities,

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\textsuperscript{182} The consequences of this misconception were devastating for the population of Latin America. In a footnote he explained that ‘Many and very notable abuses have been committed upon them as a consequence of this false belief, treating them as little better than animals and considering them unworthy of any sort of respect.’ Ibid., Book VI Ch I 329.

\textsuperscript{183} Ibid. For instance, Acosta praised the division of time and astrological predictions of the Mexica and the Incas: Ibid., Book VI Ch II 331- Book VI Ch II 334.

\textsuperscript{184} Ibid., Book VI Ch I 329.

\textsuperscript{185} At the beginning of his seventh book, he draws a parallel between the scientific study of ‘lower animals and common plants, and rocks and very ordinary things’ and his reflection on the customs of Latin Americans. Ibid., Book VII Ch I 379.

\textsuperscript{186} Ibid., Book VI Ch IV 334.

\textsuperscript{187} Ibid., Book VII Ch I 379.

\textsuperscript{188} Jose de Acosta, \textit{De Procuranda Indorum Salute Vol I: Pacificación y Colonización}, por L. Pereña et al. (Madrid, Consejo Superior de Investigaciones Científicas, 1984) Proemio 55.

\textsuperscript{189} Ibid., 63 (translation by the author).
magistrates, and a well-organized and prosperous commerce. Most importantly, they knew the use of letters. The Chinese, the Japanese, and certain provinces of the East Indies were examples of this distinguished group within the spectrum of barbarism.

The second type of barbarians also lived in settled polities with magistrates, military leaders, a sort of religious splendor, and proper mores. All these positive features notwithstanding, they were still ignorant of letters and written laws, so had no philosophic or civil science. An example of such barbarians were the ‘mejicanos y peruanos’, that is, the inhabitants of the empires of Tawantinsuyu and Anahuac. There was a tone of appreciation in Acosta’s description of their polities. Still, they were far behind the type of rationality that he considered ideal.

At the very bottom of the barbarian spectrum was a miscellany comprised by the lowest ranks of humanity. First, there were ferocious and savage human beings that resembled beasts. More peaceful barbarians, who, nonetheless, were not much different from animals, integrated a second group. Naked and fearful, they engaged in vicious practices. It is striking that in De procuranda, Acosta likened certain types of barbarians (including numerous Latin American peoples) to animals. Acosta also maintained that even they, in spite of their ineptitude and wilderness, could receive the gospel. Even in the Historia, he compared some Latin American peoples with beasts. Higher among the lowest barbarians there was a final group formed by peaceful communities. Although they had achieved higher levels of rationality than the other two groups and had ‘a certain kind of government’, they still had a very limited degree of judiciousness, as proven by their childish laws and rites.

How can we reconcile Acosta’s parallels between some Latin American peoples and animals in De procuranda with his affirmation in the Historia that to say that Latin Americans were ‘brutes and bestial folks’ was a ‘harmful delusion’? In the latter work, Acosta was always very careful not to state that

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190 Ibid.
191 Ibid.
192 Ibid.
193 Ibid.
194 Ibid., 63-65.
195 Ibid., 67.
196 Ibid.
197 Ibid.
198 Acosta, De Procuranda, Ch 1 §1 127.
199 See infra footnote 208.
200 Ibid., 69.
201 Ibid.
202 See supra footnote 182.
Latin Americans were animals or beasts. He simply compared them to ‘irrational creatures’ to underline their lack of civility in contrast to the refined Spaniards.

One possible explanation for this change is that he may have realized over the course of years that separated the two publications that, by assimilating Latin Americans to animals and hence stressing their irrationality, he was opening the door to the argument that their limited capacity made them unfit to receive the Gospel. The use of Latin Americans’ animality to demonstrate their lack of civility could backfire, eventually undermining the evangelizing role of the Jesuit order in Latin America and the religious project of the Catholic Church on the continents. For this reason, he was aware he had to tread a thin line between identifying the Latin Americans with animals and conveying to his audience the sense that some of them resembled their wilderness.

Many Latin American societies fell within Acosta’s third category of barbarism. He cited, for instance, the ‘chunchos, chiriguánás, moxos, and iscaicingas’. To these groups he added most Brazilian peoples and the inhabitants of Florida, the so-called ‘moscas’ of Nueva Granada, the promiscuous communities of Cartagena and its coastline, the population of the vast fields of the immense Paraguay river, and most of the peoples that occupied the infinite space that separated the two Oceans.

In the *Historia*, Acosta expanded the classification of Latin American peoples from two to three groups. He gave these categories a historical motion by explaining them as different stages of social complexity. The most sophisticated of all the societies the Spanish encountered in Latin America were ‘the Kingdoms of Peru and Mexico’, which significantly surpassed any other social group. They represented the finalized social form acquired after hundreds of years of social transformation by the savage and hunting communities who had migrated to the continents. Between the most barbaric and the most refined stages of pre-Spanish social life, there was an intermediate phase in which traits from the superior and inferior periods mixed. His description of these three historical periods was part of a larger explanation of the origins of Mexico society.

Acosta recounted the example of the inhabitants of Anahuac (or New Spain), the Chichimecas, a forest-dwelling people who did not practice agriculture and merely survived from the products of hunting. They were savages and, hence, had no proper communities. They lived like beasts, without government,

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203 Ibid., 67.
204 Ibid.
205 Acosta, *Natural and Moral History*, Book I Ch 24 74.
206 Ibid.
207 Ibid., Book VII Ch II 380.
settlement, or clothes.208 Because of this lack of fixed abode, ‘fighting with them’ was ‘exactly like hunting beasts, for they scatter and hide in the roughest and most thickly wooden parts of the mountains’.209 These types of humans were not a mere relic of the past, like the Chichimecas. Even at the time that Acosta wrote, there were many regions of Latin America in which the same lifestyle could be found.210 As he affirmed, this was the ‘kind of wild Indians’ that he referred to in De procuranda when he stated that they first had to ‘be taught to be men and then to be Christians’.211

Other groups like the Otomíes inhabited towns, had some sort of polity, and were not too inept to receive Christianity.212 Whereas the Chichimecas lived in a kind of ‘state of nature’, the Otomíes had clearly reached proper civil life, but had not yet attained the level of sophistication of the inhabitants of the empires of Tawantinsuyu and Anahuac.

How did the social transformation that drove peoples from one stage to another come about? For Acosta, as for Las Casas, the assimilation of inferior social forms into superior ones was a natural phenomenon. Once the two were in contact, communication opened channels for purposeful learning and spontaneous imitation.213 In other words, it was just a matter of time until the most barbaric peoples started to imitate the more refined mores of advanced commonwealths. This mechanism of learning ran like a thread through the three stages of Latin American social change. Therefore, Acosta declared:

I am convinced that most of the provinces and nations in the Indies have developed in the same way: the first of them were savages and, in order to maintain themselves by hunting, they little by little penetrated inhospitable lands and discovered a new world, living in it almost like beasts; they had no dwelling places nor roofs nor cultivated fields, nor livestock nor king, nor law nor God nor the use of reason. Later others, seeking new and better lands, settled the better parts and instituted order and polity and some sort of commonwealth, though still a very savage one. Later still, either from these or from other nations, men who possessed more energy and craft than the rest began to subdue and oppress the less powerful, until they formed great kingdoms and empires. Thus it was in Mexico, thus in Peru, and thus it undoubtedly is in all places where there are cities and commonwealths founded by these barbarians.214

208 Ibid.
209 Ibid., 381.
210 Ibid.
211 Ibid.
212 Ibid.
213 Ibid., Book VII Ch III 385.
214 Ibid.
There is a clear environmental ring in Acosta’s social ordering. Whereas the first ‘wild Indians’ had no productive capacity and skills whereby they could have carved a social niche out of wild landscapes, the great and industrious Latin American empires were resourceful enough to settle fertile valleys and till their fields.\textsuperscript{215} In a passage that anticipated the kind of logic that informed the agricultural argument,\textsuperscript{216} he maintained that because savage peoples could not ‘reap or sow’ they ‘left the best and more fertile part of it (New Spain) unpeopled; and that part was occupied by nations that came from elsewhere’.\textsuperscript{217} Acosta also used certain categories to refer to specific Latin American societies (e.g. savage and wild) that associated the concrete productive activities (hunting) of those communities with the degree (or lack, as in this case) of social complexity.

The denomination of savage was later adopted by the English to describe the peoples of North America during their conquest of the northern part of the continent. Eventually it became synonymous with a lack of capacity to efficiently utilize natural ecosystems. In the eighteenth century the category of savage formed part of the theories that attempted to provide a historical and ‘scientific’ explanation of how societies evolved and improved.

Despite the undeniable influence of Acosta’s account in subsequent secularized analyses of North American commonwealths and theories of social change, there are still some relevant divergences between them. For example, whereas several Enlightenment intellectuals, particularly those in the Scottish Enlightenment, understood social progress in linear terms, progress was cyclical for Acosta. He believed that most Latin American peoples had ‘risen and multiplied’ from ‘savage and fugitive men’ who migrated to the continent from distant territories in search of new lands.\textsuperscript{218} Although the first men who entered Latin America were wild, they had come ‘from civilized and well-governed countries’.\textsuperscript{219} For Acosta their lack of sophistication was a consequence of having forgotten their customs during their long journey.\textsuperscript{220} Savagery was not the result of a special effect or defect of Latin America as such. In fact, the same backwardness, derived from a lack of memory of refined customs, could be found in Spain or Italy where some groups had only a few human traits.\textsuperscript{221}

\textsuperscript{215} Ibid., Book VII Ch II 381-382.
\textsuperscript{216} This was an argument according to which all the lands that were not tilled or were improperly cultivated in Latin America could be acquired by European colonists. For a more thorough exposition of this concept see infra Chapter 4, pages 187-205.
\textsuperscript{217} Acosta, \textit{Natural and Moral History}, Book VII Ch II 381.
\textsuperscript{218} Ibid., Book I, Ch 24 71 and Ch 25 74.
\textsuperscript{219} Ibid., Book I Ch 24 72.
\textsuperscript{220} Ibid.
\textsuperscript{221} Ibid.
Unlike posterior theories, Acosta’s view of social evolution was still framed within a religious mold. The achievements of the empires of Tawantinsuyu and Anahuac were praised because they showed that both societies were ripe for the arrival of the Gospel. 222 A previous historical event that mirrored this situation was the conversion to Christianity of the Roman Empire once it reached the pinnacle of its power. 223 So, despite recurrent cycles of social improvement and deterioration derived from the need to populate the whole world, there was an overall linear advance toward Christianity and progress. Ultimately, the history of humanity was one, because ‘every men’ came ‘from one man’ and every commonwealth was bound to be evangelized. 224 God as creator and redeemer was the initial and final point of human history.

The environmental program of perfecting Latin American nature by abandoning backward practices such as hunting, and instead squeezing its bounty through agriculture, was complemented by Acosta’s interest in dismantling Latin Americans’ religious beliefs. It was not enough to change the way in which certain Latin American peoples altered the environment; it was also vital to change the way in which all of them perceived it. In fact, Acosta linked Latin Americans’ general lack of social achievement with their low rational capacity to understand how nature really operated. Due to the ‘pitiful condition in which many Indians have lived, and still live’, 225 it was ‘extremely difficult … to root out of their minds the idea that there is no other god or deity but only one, and that all other things have no power or being of their own, or operation of their own, than what is given and communicated to them by that supreme and only God and Lord’. 226

Latin Americans were like children: easy to trick and, therefore, susceptible to manipulation and deception by the devil. 227 Nothing was more dangerous than their erroneous judgment about non-human nature. Like the Greeks or the Romans, Latin Americans worshipped ‘noble’ natural deities such as the sun, the moon, the stars, and the elements. 228 Some of them even adored natural elements that seemed for Acosta rather foolish like ‘rivers, fountain, ravines, rocks, large stones, hills’ or, actually, ‘anything in nature’ that they perceived as notable. 229 They also venerated animals in order to avoid their attack. 230

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222 Ibid., Book VII Ch 28 445.
223 Ibid.
224 Ibid., Book I, Ch 25 73.
225 Ibid., Book V Ch 5 263.
226 Ibid., Book V Ch 3 258.
227 Ibid., Book V Ch 5 263.
228 Ibid., Book V Ch 4 260.
229 Ibid., Book V Ch V 262.
230 Ibid.
For Acosta, the reason for this unacceptable behavior was that although God had created all natural elements ‘for the service of man, man has been so unsuccessful in ruling and governing them that on the one hand he has tried to raise himself to be God and on the other has recognized and subjected himself to creatures lower than him’. 231

Acosta’s tone in this part of his book was condemnatory. He spoke about ‘blind Indians’ underlying their ‘sinfulness and perdition’. 232 Latin Americans’ conviction of the sacredness of nature was just the result of the devil’s mischievous trickery. Convincing them of the right way to conceptualize and understand nature became a way of protecting their mind against perverse satanic influences. For the sake of their salvation, missionaries could not tolerate ‘childish’ rituals of adoration of the natural world. 233 Acosta recounted the story in which a Spanish soldier saw Latin Americans chanting and reciting a mantra in order to invoke the rain. Instead of letting them go on with their practice, he convinced them to build a cross and worship God. 234 The effect was miraculous, because soon after they did as they were told it began to rain. 235 The message of this passage was clear: nature was God’s instrument and only the Creator (and to a lesser extent those who followed his creed) could command it.

It might be too daring to affirm, as Lynn White did in the 1960s, that in general ‘[b]y destroying pagan animism, Christianity made possible to exploit nature in a mood of indifference to the feelings of natural objects’. 236 But Acosta’s religious reconceptualization of the way Latin American nature ought to be perceived shifted the power from nature to an external deity. This understanding, which most of Acosta’s contemporary countrymen shared, may have contributed to creating a conceptual space for the application in Latin America of an economic program of environmental transformation that exponentially increased European power while filling the pockets of all those implicated in the exchange of commodified natural elements. The story of how the evangelizing mission in Latin America was transformed by Protestant natural lawyers into a ‘more secular’ project—or perhaps more exactly into a religiously different project—of wealth accumulation will be the focus of the next chapters. In the context of European imperialism, that project acquired a globalizing pull, and was to have enormous political, economic, social, and environmental implications.

231 Ibid., Book V Ch 4 260.
232 Ibid., Book V Ch 25 261-262.
233 Ibid., 263.
234 Ibid., Book VII Ch 27 442.
235 Ibid.
236 White, ‘The Historical Roots’, 52.
Concluding remarks

The works of Vitoria and Las Casas contributed to the historical development of rights applicable to all peoples, as well as legal rules that regulated interactions between different commonwealths. The stature of these Spanish Scholastics in present-day Latin America is evidenced by streets and squares in their memory\(^\text{237}\) and human rights institutions that have taken their names as inspiration\(^\text{238}\) while following in their footsteps as guarantors of human rights and the rights of Latin American peoples. Notwithstanding their humane contribution to colonial debates, there is an equally relevant though less appealing side of their legacy. They sketched the legal contours and the ideological tapestry that eventually legitimized colonialism—albeit a softer version of it—and cemented an unsustainable relationship to nature in Latin America.

Vitoria’s economic rights created the legal mechanisms for the private appropriation of Latin American natural resources. According to the School of Salamanca, private property gave the owner a complete power over its possessions, only limited by law. The quasi-sacred nature of private property and the possibility of acquiring vacant land in Latin America, together with the regulative power of the Spanish Crown, helped the eventual emergence and consolidation of the *latifundia* or vast landed estates that in time led to one of the highest indexes of unequal land distribution worldwide\(^\text{239}\). Instead of fulfilling its social function, land became commercialized creating affluence at one end of the spectrum but also landlessness and impoverishment at the other end.\(^\text{240}\) In addition, propelled by the universal legal sanction of free international trade, economic inequality (a remarkable feature of Latin American societies) transcended the geographical borders of the continent and, from the sixteenth century, gradually extended across the colonial world.

Las Casas and Vitoria contributed as well to legitimize the evangelizing mission, which imposed—if gently—a novel way of conceiving the human-nature relationship. God had created humans in its image...

\(^{237}\) The UN has also acknowledged the historical importance of Vitoria. In June 1987 the Council Chamber of the Palais des Nations in Geneva was named ‘Room Francisco de Vitoria’. See Pereña, *The idea*, 9.

\(^{238}\) The Center for Human Rights Fray Bartolomé de las Casas in the Mexican state of Chiapas is just one example. See [http://www.frayba.org.mx/, accessed 24 September 2015](http://www.frayba.org.mx/).


\(^{240}\) In Brazil, the Landless Peasant Movement (MST) has based its demand for an agrarian reform precisely on the fact that whereas vast tracts of land remain uncultivated or oriented toward industrial commercial agriculture, millions of Brazil’s landless peasants face impoverishment in rural areas and marginalisation in the *favelas* after migrating to big metropolises in search of work. See Angus Wright and Wendy Wolford, *To Inherit the Earth: The Landless Movement and the Struggles for a New Brazil* (Oackland, Food First Books, 2003).
so that they too could rule over non-human nature. A relevant aspect of this environmental power was the association of human and social progress with the transformation of nature.241

Because of this ideological homogeneity, and despite good intentions, the protective responses of Vitoria, Soto, Las Casas, and Acosta to the conquest of Latin America lost all the richness, variety, and nuance of Latin Americans’ worldviews. This affected the relationship between humans and nature, as the voice of those who could utter a radical—in the sense of a radically different—interpretation of its meaning, value, and economic function at the time of conquest was silenced. The Dominican and Jesuit friars incarnated the humanitarian spirit of their time, one that was characterized by an absolute confidence in a superior universal truth and the moral imperative of its dissemination. As a result, the space for alternative visions of the good life in Latin America shrank considerably.

Against doctrines that proclaimed the complete differentiation of colonizer and colonized, Vitoria and Las Casas predicated their legal parity. Thus, the regulative power of the rights that belonged to all human beings and commonwealths became automatically applicable to Latin American peoples. But the universality of the law made possible a hegemonic particularity imposed over other particularities. Then, once colonizer and colonized were brought into the same universal legal community, difference coexisted with the alleged universal character of the law. The colonial subjects’ need for religious and social transformation—conceived of as improvement—and the supposed power of the colonizer to bring them about gave the latter’s beliefs, customs, values, and institutions an (illusory) progressive and redemptive character. This second imperialist moment (built on the former), in the formation of a universal language of rights, subtly incorporated Latin American commonwealths under the institutional apparatus that served an alien worldview. Defined as lacking, incomplete, and wanting, at least in some respects, Latin Americans’ full identity rested on their oppressors’ recognition and acceptance. For the friars, conversion to their religious vision was the first step toward social enhancement.

Critical scholars have shed light on these moments of inclusion and exclusion during the early developments of a vocabulary of universal rights.242 However, the pivotal role that nature played in providing a conceptual basis for their genesis is less acknowledged. The fusion of Latin Americans with nature served Spanish commentators by emphasizing their lack of rationality and non-assimilability to the Spaniards. In reaction to this fundamentally unequal way of defining the colonial subject, Vitoria and

241 Fitzmaurice affirms that, for Vitoria, ‘a just society is one that has shown an ability to exploit nature, one that has taken things and made them into property and thus one that has occupied both physical and political space.’ See Fitzmaurice, Sovereignty, 10.
242 In this sense, see the groundbreaking work of Anghie, Imperialism, 13-31.
Las Casas rejected the extreme version of the ‘state of nature’ as a way of defining the degree of
civilization of Latin American commonwealths. Nevertheless, their reaction of inclusion naturalized the
separation between the natural and social domains, a separation that became part and parcel of the way
in which new universal rules regulated inter-commonwealth relations. In addition, Vitoria, Las Casas,
and Acosta acknowledged Latin Americans’ inferiority with regard to their capacity to master the
environment. This judgment was based on a conception of the world that emphasized the primacy of the
social sphere over the natural sphere while associating that preponderance with the characteristics of a
specific nation: Spain.

The vocabulary of economic rights developed by Vitoria, Soto, and the School of Salamanca provided
the legal basis for Spanish economic hegemony in Latin America. Those rights allowed nature’s
constituent elements to be turned into commodities. This shift in the use of Latin American landscapes
was in line with the religious lens of Vitoria, Soto, Las Casas, and Acosta, according to which post-
lapsarian social improvement could only take place through the exercise of an increasing control over
nature. Hence, the alleged superiority of Spaniards in mastering the Latin American environment
reinforced the importance of the applicability in Latin America of the legal instrument that made it
possible: Spanish economic rights. The legal power to appropriate private land and natural resources for
personal benefit, together with the representation of that possibility as socially progressive, opened the
Pandora’s Box of environmental exploitation. The public and private economic forces that imperialism
set in motion eventually shattered the fragile limits that Vitoria, Soto, and Las Casas tried to impose on
the unfolding of the Spanish Empire and the emergence of an empire of private economic power.

The influence of Vitoria’s, Las Casas’, and Acosta’s assessments of the social advancement of Latin
American societies surpassed the Latin American context. Their idea that certain Latin American
societies lacked the knowledge and the productive activities whereby they could satisfactorily exploit

243 In practice, the discrimination of Latin American peoples became extreme in the mixed colonial Spanish Latin America. After several centuries of cultural imperialism, the descendants of the Latin American peoples still bear the stigmas of racism and discrimination. Marginalisation created a strong psychological effect of inferiority that, once internalised through assimilation, deterred resistance. It is not a coincidence that the revival of numerous elements of the—much-transformed—cultures of pre-Columbian societies has affirmed their identity and fostered their self-esteem. The emancipative effect of living in accordance to their own conception of the good life has spilled over to the political and economic realms. See Edward L. Clearly and Timothy J. Steigenga, Resurgent Voices in Latin America: Indigenous People, Political Mobilization and Religious Change (New Brunswick, Rutgers University Press, 2004). See also Sven Harten, The Rise of Evo Morales and the MAS (London, Zed Books, 2011). This, of course, does not take away the fact that resistance to colonial rule started with Columbus arrival at La Española and has continued ever after. So, Spanish cultural imperialism weakened resistance as long as it remained invisible, but ignited resistance whenever it became evident.

244 This does not mean that Spain became richer. Actually, the contrary is truth: the financial problems of the Crown drained Latin American bullion, which ended up in the hands of European lenders, merchants, or in distant Asian markets.
their surroundings was to have an enormous influence in the following centuries as part of the ideological arsenal of imperialism. In the subsequent chapters, we will see how natural lawyers started to find explicit links between the material and conceptual dimensions of the colonization of non-Europeans ecosystems. Eventually both threads became knitted together in a coherent and general theory of social progress that was to have enormous historical implications. The story of how these two components developed and became intertwined is the focus of the next section.
The Spanish Empire reached its zenith by the end of the seventeenth century. This came after its annexation of the Crown of Portugal in 1580—an act which enabled it to acquire the world’s largest navy, thus greatly facilitating the patrol of its Atlantic colonial possessions and trade in the East Indies. However, despite its modern, powerful military apparatus and political leverage, the foundations of the Empire were weakened by structural economic problems and particularly fiscal stress.\(^1\) On top of that, Spain waged costly wars in order to maintain its European hegemony, which further jeopardized the financial sustainability of the empire. Unable to neither compete with the economic dynamism of two of its rival European nations—the English and the Dutch—nor find an antidote to counter the ideological religious project of the Reformation, the country began to lose its pre-eminence in both the material and ideological domains.\(^2\)

Over time, the Dutch Republic and England consolidated their political independence and expanded their naval prowess, which enabled them to seize part of the Iberian Atlantic and East Indian trade and acquire imperial stature. The commercial expansion of both nations provided a springboard to control the world economy to an extent that was historically unprecedented.\(^3\) In fact, by the mid-seventeenth century, the Dutch succeeded in displacing the Portuguese from the East Indies. Alongside this, they were the main trading power in the Baltic, the Mediterranean, and the Atlantic.\(^4\) England followed suit, extending its commercial reach to the East Indies and the Atlantic while—at the same time—founding colonies in the eastern part of the American continent.

The emergence of new imperial powers represented not just a reconfiguration of the colonial map but also a shift in the course of the history of the world economy. Capitalist relations were slowly

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\(^2\) Ibid., 66.


consolidated in the northern Netherlands and England.\textsuperscript{5} The successful economic experiences of those nations at home ran in parallel with expansionist mercantile ambitions, resulting in the exercise of an increasing private economic power over the rest of the world. These developments, coupled with the exploitation of African slaves in American plantations by combining pre-capitalist and capitalist relations of production, helped the eventual transition to full-blooded capitalism.\textsuperscript{6} One of the significant consequences of these economic changes was the substantial increase of the incentive to exploit the world’s natural resources.

At the beginning of the seventeenth century, the juridical basis for the exploitation of natural resources in the context of European colonial expansion rested mainly on the inclusion of the legal institutions of *dominium rerum*, long-distance trade, and the law *ferae bestiae* as part of *ius gentium*, by the father of the School of Salamanca, Francisco Vitoria, and to a certain degree by his disciple Domingo de Soto. In the opening part of his lecture *De indiis*, Vitoria had concluded that the peoples of America were sovereigns of their territory and private owners of their lands. However, in conjunction with these rights he also acknowledged a series of legal titles whereby Latin Americans could be ruled by the Spanish. Spanish colonists could also exercise private power over Latin American ecosystems by appropriating unoccupied natural resources. Spanish material power over the environment was amplified by a Christian vision of social improvement, whereby the increase in complexity of a commonwealth was related to its capacity to master nature. In addition to personal wealth, this conceptual basis for the transformation of natural habitats generated a further impetus to exploit them.

In following centuries, European intellectual figures such as Grotius, Vattel, Locke, Pufendorf, and Wolff reflected to a greater or lesser extent on the question of whether natural resources (including land) could be seized in the colonies. While all of them admitted the possibility of acquiring territory in non-European lands, they differed on the scope of the right to occupation and on the kind of *dominium* derived from it. Whereas for Grotius and Locke acquisition of land in the colonies entailed its privatization, for Vattel, Pufendorf, and Wolff occupation gave rise to sovereignty. In general, the result of these theories was the legitimation of the transfer of colonial natural resources to European hands, which facilitated the transformation and eventual degradation of nature.

There were still important differences between Spanish friars and subsequent authors. Whereas the former were in principle wary of capital accumulation, some of the latter, namely Grotius and Locke,
had direct economic interests in colonial ventures, or worked for states or companies that profited from colonialism. Their personal stakes explained in part why their theories legitimized capital gain and enrichment derived from European imperialism. Besides, for Vitoria Spanish rights were meaningful only in correlation with the *ius predicandi*, and Las Casas and Acosta elaborated their theories on the mores of the peoples of America in order to promote the evangelizing mission rather than a secular project of material accumulation.

Once the law of nations lost part of its religious outlook and the commentators that helped its development distanced themselves from the ‘anti-capitalist’ bias characteristic of commentators critical of capital accumulation such as Las Casas, the link between the institutions of private property and international trade with efficiency, material wealth, and social improvement became more explicit and robust during the seventeenth and eighteenth centuries. The result of that association was the emergence of a commercial approach to natural habitats beyond European borders which was difficult to challenge, as any attack against the imperialist economic institutions and legal regimes that supported it could be interpreted as an attack against the very idea of social advancement, and ultimately against the necessary, teleological unfolding of human history.

Chronologically this section starts with the apprehension of the Santa Catalina by the Dutch East Indian Company (*Vereenighde Oostindische Compagnie* or VOC) in 1603, which spurred Grotius’ reflections about international trade. It ends with the publication of *The Wealth of Nations* in 1776, a treatise in which commercial societies were elevated to the apex of social advancement, presented as the most progressive political formations to which human communities could aspire. Grotius and Smith mark the beginning and the culmination of a new wave of intellectual reflections about European imperialism and social improvement, with important overtones for non-European peoples and their natural habitats. *The Wealth of Nations* was published before the establishment of the first British colony in Australia, an event that would open a new chapter in the history of European imperialism.

Apart from commerce, one of the economic institutions recognized as a universal right in the law of nations, *dominium rerum*, greatly facilitated the increase of private power over material reality. In other words, its legal universalization went hand in hand with the privatization of nature worldwide. In fact, private property and trade operated together. Anchored in legal justifications provided by natural lawyers, the extension of inter-continental trade and plantation agriculture overseas fostered the commoditization of colonial ecosystems and natural resources in the East Indies and European Atlantic—dependencies that had been previously privatized.
During the seventeenth and eighteenth centuries, spices, furs, fish, sugar, tobacco, indigo, cotton, timber products, and food supplies, among others goods were inserted in trans-oceanic networks of exchange that linked Europe and America. They fostered innovations in European manufacturing, finance and marketing while also strengthening commercial links between Europe, Africa, and Asia.\(^7\)

Profits and returns became an increasingly determining factor in the measurement of nature’s value.

Because of commerce between the colonies and the metropolis, the environmental constraints on the expansion of European production—related to domestic patterns of increasing consumption and population growth—were loosened. The natural resources that Europeans needed to sustain their economic growth at an optimal level could be obtained in overseas territories,\(^8\) providing an escape valve for an increasingly unsustainable Europe.\(^9\)

From an ideological standpoint, the idea of improving nature through commercial agriculture was the legal rationale for international legal theories of occupation and land acquisition in non-European territories. Most scholars truly believed that the transformation of the environment through what they considered as superior and universally desirable economic practices—though of European pedigree—was a positive change that justified their preponderant access to the natural resources. Besides, legal commentators did not fail to notice the profitability of this sort of blueprint for environmental transformation. They translated that idea of betterment into legal reasoning establishing it as the basis for ownership and/or sovereignty over non-European territories.

The use of legal arguments based on an environmental logic of efficiency and productivity in order to legalize imperial expansion, entailed a departure from preceding Spanish legal theories and their...

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\(^7\) Nicholas Canny, ‘Atlantic History and Global History’ in Greene and Morgan (eds.), *Atlantic History: A Critical Appraisal* (Oxford, Oxford University Press, 2009) 317-336, 326. Black has pointed out the economic importance of import, re-export, and processing of American colonial products such as coffee, sugar, tobacco, cotton, and rice. See Black, *Europe and the World*, 57-75.


discredited justifications of empire derived mostly from religious categories. By avoiding the examination of the institutional apparatus, cultural practices, and personal condition of colonial populations, the novel and a priori objective legal doctrines put forward by authors such as Grotius, Locke, and Vattel seemed more impartial and, hence, more legitimate than the subjective theories of Spanish commentators.

In North America, supposedly vacant lands and natural resources were appropriated for farms and plantation agriculture. The capacity of British settlers to improve North American land was considered as a sign of their superiority in mastering nature vis-à-vis backward North American populations. Even if Europeans’ superior capacity to manipulate nature was not always translated into explicit hierarchical categories, European economic practices and technical expertise were nevertheless impliedly regarded as the law of nations’ standard to determine who should be the rightful owner of natural resources in North America. Under the impact of conquest and forceful apprehension of natural resources, North American societies struggled for survival as much as their southern counterparts under tyrannical Spanish rule.

Environmental historians have demonstrated that non-European populations were more knowledgeable, creative, complex, and sophisticated than international legal theories recognized. They had also shown that colonial landscapes were ‘less wild’ than international scholars assumed, as the impact of its inhabitants (through agriculture, hunting, gathering, use of fire, etc.) had for millennia created humanized landscapes. The fluidity of the ‘colonial world’—neither completely wild nor entirely ‘civilized’ (according to European standards)—could not be captured by the simplified images and assumptions with which the commentators of the law of nations had diligently constructed their idea of progress.

Chapter 4 explores how the legal institution of dominium rerum, free trade, and the doctrine of occupation gave international legal validation to European political and economic power in the East Indies and North America, enhancing its imperial reach. During the seventeenth and eighteenth centuries, non-European nature was materially apprehended in this way. In addition, Chapter 5 looks at the way in which such practices were turned into cultural markers, becoming the premises for a narrative of social

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10 This criterion of civilization permeated Spanish colonial debates on the humanity of the peoples of America. See Seed, ‘Are These Not’. The evangelization of colonial subjects became the target of severe criticism as a consequence of the Spanish black legend promoted by the Augsburg European rivals, especially the Dutch.
11 See supra Chapter 1, pages 22-29 and 53-56.
12 Ibid.
progress based on environmental superiority that validated Europeans’ privileged access to natural resources. Unraveling the interrelation between the economic institutions and the cultural narrative of social improvement that underpinned the law of nations during the seventeenth and eighteenth centuries is of utmost importance in order to understand the legitimization of the way in which North American natural habitats were appropriated. Eventually, the material and conceptual dimensions of the European colonization of nature fused, thus providing a rather solid justification of European imperialism that was to have enormous implications during the first half of the nineteenth century.
The Material Appropriation of Nature: Trade, Private Property, and the Agricultural Argument in the East Indies and North America

If desert and uncultivated places are transformed by cultivation from sterile or at least useless places into fertile and useful places, since in this manner industrial products are multiplied and a crop of natural products is developed by industry and exertion, which assuredly tends to the perfecting of the condition of the nation.¹

As in the case of Latin America, private property, trade, and occupation played a fundamental role in European expansion during the seventeenth and eighteenth centuries in the East Indies and North America. These juridical institutions allowed what I have termed the ‘material appropriation’ of ecosystems in non-European territories, that is, the apprehension and exchange of particular parts of nature, such as minerals, animals, medical plants, etc., and the transformation of particular habitats into plantations for export to international markets. The transformation of ecosystems into commodities reduced biodiversity and had severe localized impacts in the non-European territories in which Europeans decided to intensively extract or produce certain natural resources.

During the seventeenth and eighteenth century, natural lawyers further developed the rights to private property, trade, and occupation that Spanish scholastics had previously enunciated as part of the ius gentium. Grotius, Pufendorf, Locke, Wolff, and Vattel further theorized about these economic institutions and theories in their disquisitions on the law of nations. There was no uniformity in their treatment of these institutions. Authors disagreed on the scope and applicability of rights of an economic nature, particular when it came to their use in non-European territories. However, they all shared the conviction that seizing nature and exploiting it in order to improve the world was legal and legitimate.²

² As Andrew Fitzmaurice has noticed: ‘the fact remains that the natural law arguments of trade, and friendship and occupation were used by Europeans to dispossess indigenous Americans and other indigenous peoples.’ See Fitzmaurice, *Sovereignty*, 60.
This conviction was a reflection of the important transformations that were underway in their own societies, particularly in the second half of the eighteenth century. In countries like England, the Netherlands, or France, the material condition of life had started to improve thanks to the application of humans’ increasing scientific and technical power to the transformation of nature. Moreover, this secular impulse based on economic factors was still in consonance with Protestant theology. As in the case of Vitoria, natural economic rights and Protestant views on the human relationship with nature tended to converge toward the same goal of improvement through exploitation. The Protestant way of understanding non-human nature was particularly influential in North America due to the strong religiosity of the first settlers. The belief that God had commanded humans to dominate nature paved the way for economic theories and institutions that helped give concrete expression to that power.

Even though the religious and ideological backgrounds of Vitoria and later intellectuals had certain similarities, there were also fundamental differences. This explains the different orientations that Vitoria’s doctrines and those of later authors had. Neither Vitoria, Soto, Las Casas, nor Acosta for that matter were directly invested in the economic dimension of colonization and the material gains derived from the exploitation of labor and natural resources in the colonies—in fact Las Casas strongly criticized it. In contrast, thinkers like Grotius and Locke defended the economic interest of colonial actors, even investing directly in colonial ventures. But even authors who did not have a direct stake in European imperialism were interested in the ways in which their nations could flourish by participating in the economic gains that colonialism brought about. For them, too, private property, trade, and agriculture were the best recipes to that end.

Scholars who represented the interests of small European powers put the accent on the freedom of commerce, in the possibility of each nation to protect itself from the commercial encroachment of the most powerful ones. In contrast, those that represented great maritime empires tried to articulate as permissible and expansionist a doctrine of free trade as possible. Similarly, they amplified the scope of the right to occupy vacant natural resources and especially land in non-European territories. In North America, these theories lay the foundations for the whole appropriation of the continent several decades after the American War of Independence. That is, however, a later story, one that only makes sense after examining the genesis of the legal and ideological mechanisms at play in the North American context. British inroads in North America and Dutch commercial imperialism in the East Indies created the need for legal developments that allowed the continuous expansion of international markets and the concomitant exploitation of non-European ecosystems.
Reformation theology and human power over nature

Christianity had also influenced the Spanish scholastics’ views about the natural world. Notwithstanding nuances in approach, they all believed in a strict separation between the natural and human spheres. Only rational creatures could have natural rights. Moreover, some authors like Vitoria, for instance, put non-human nature at the complete disposal of human beings. This approach was in consonance with the theology of Saint Thomas Aquinas.4

The main treatises on the law of nations during the seventeenth and eighteenth centuries were written after the Reformation had started to alter the religious and political configuration of Europe. Protestantism consciously broke with the Catholicism that had inspired the reflections on universal rights of the Spanish scholastics. But was there any difference in the way authors from both periods understood human power over the natural world? Did the Reformation introduce a novel way of understanding the human relationship with nature?

The theology of Martin Luther (1483-1546) and Jean Calvin (1509-1564) can be defined as ‘theanthropocentric’ because of its focus on the relationship between God and humanity and, particularly, on the question of human salvation. They devoted less attention to examining the status of non-human nature and its relation with humans. Still, both authors reflected on the Genesis, offering their own interpretation of the divine mandate of human dominion over non-human nature. In this regard, there are several parallels between their views and those of Aquinas (who inspired the Spanish scholastics).

Luther considered humans in the state of innocence as outstanding creatures and ‘far superior to the rest of the living beings’.5 Human superiority was the consequence of three interrelated factors. Humans, unlike other creatures had been created in God’s image. In contradistinction to animals and trees, which were products of the Earth, they had also been created directly by God.6 Finally, there was an important distinction (made also by Aquinas) between humanity’s physical dimension, shared with lower creatures, and their immortal life, which set them apart from all other animals.7

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3 See discussion in Chapter 2, pages 98-105.
4 Ibid., 41-42.
5 This is the terms used in Santmire, The Travail, 122-123.
7 Ibid., 2:7, 86
8 Ibid., 84.
Regarding human mastery over nature, Luther affirmed that God had created Adam and Eve with the aim of them ruling the Earth. This objective was not mere advice but an express command. This command implied a certain kind of power whereby they were placed ‘over the entire animal creation’. There is a clear anthropocentrism in Luther’s interpretation of the function of non-human nature. All creation was meant to serve humans, providing them an abode. To demonstrate this point, he cited God’s affirmation that: ‘The heaven I have prepared as a roof; the earth in the flooring; the animals—with all the appointments of the earth, the sea, and the air—are the possession and wealth; seeds, roots and herbs are the food’. Briefly, non-human nature had been created with the specific purpose of serving human needs.

Human dominion over the earth and its creatures diminished as a consequence of the original sin. For Luther, the earth was ‘cursed because of Adam’. Non-human nature was innocent and had committed not sin, but Adams’ disobedience condemned it to share humanity’s fate of degeneration. The ‘course of the earth’ was amplified by the impact of the Flood that further transformed it into a barren place and a ‘waste’. Moreover, the continuance of humanity’s sinfulness made the world further deteriorate day by day. For Luther, the result of all these changes was the transformation of the Earth from a fertile garden into an inhospitable wilderness. Luther never explicitly used the word wilderness, but his description of the world after the Fall and the Flood conveys the same idea. His words are illustrative:

This course was made more severe through the Flood, by which the good trees were all ruined and destroyed, the sands were heaped up, and harmful herbs and animals were increased. Accordingly, where, before sin, Adam walked about among most fertile trees, in lovely meadows, and among flowers and roses, there now spring up nettles, thorns, and other troublesome sprouts in such abundance that the good plants are almost overwhelmed.

10 Ibid., Genesis 1:26, 66.
11 Ibid.
12 Ibid., Genesis 1:29 and 31, 73.
13 Scott Icker, ‘Luther and Animals: Subject to Adam’s Fall?’ in Andrew Linzey and Dorothy Yamamoto (eds.), *Animals on the Agenda: Questions about Animals for Theology and Ethics* (Urbana/Chicago, University of Illinois Press, 1998) 90-99, 91.
14 Ibid., Genesis 3:17,18,19 and 204.
15 Ibid.
16 Ibid., 204-206.
17 Ibid.
18 Luther reputedly compares Paradise, humans’ first abode, with a garden. See Ibid., Genesis 2:7, 8-2:9, 87- 92.
19 Ibid., Genesis 3:17,18,19, 205. In another passages Luther adds several dangerous and destructive natural elements and phenomena to the former list: ‘frost, lightning bolts, injurious dews, storms, overflowing rivers, settling of the ground, earthquakes …’; Ibid., 206.
The diminution of human perfection due to the original sin did not degrade humanity to the extent of equating humans to non-human nature. There was ‘still a great difference between the human being and the rest of the animals’.\textsuperscript{20} Still, because of the Earth’s corruption, humanity was compelled to work harder in order to get what nature had spontaneously furnished before. So, the transformation of wilderness into a new garden could not be achieved by ‘the dominion which Adam had but through industry and skill’.\textsuperscript{21}

As Luther had, Jean Calvin emphasized the excellence and pre-eminence of humans among all creatures.\textsuperscript{22} Having been created in God’s image, humans were set apart from the rest of God’s works and given ‘the highest place in its creation’.\textsuperscript{23} Their immortal soul and reason placed them above all brute animals.\textsuperscript{24} Notwithstanding the subordination of material reality to the spirit, Calvin did not have an entirely negative view of nature; quite the contrary, he recognized ‘the beautiful order of nature’.\textsuperscript{25} Still, that order was completely subjected to God’s power. Calvin frequently referred to nature as the work of God.

According to Calvin, God’s mandate of dominion over the world enshrined in Genesis gave humans authority over all other living beings.\textsuperscript{26} Humanity was at the center of God’s plan, and material reality had been created for its use and benefit.\textsuperscript{27} God was the sovereign and ruler of nature in an absolute sense. After Creation, He continued governing heaven and earth by his providence, so that nothing happened ‘without his counsel’.\textsuperscript{28} As offspring of the Almighty, humans were also lords of the whole world.\textsuperscript{29} This power was corroborated by God’s command to subject the Earth to human control.\textsuperscript{30} According to Santmire, in Calvinist theology human power over history and the environment received theological validation.\textsuperscript{31}

\begin{thebibliography}{99}
\bibitem{note20} Ibid., Genesis 1:26, 67.
\bibitem{note21} Ibid.
\bibitem{note23} Calvin, \textit{Institutes}, Vol 1 Bk 1 Ch XV §4 164-165.
\bibitem{note24} Calvin, \textit{Commentaries}, Vol 1 28.
\bibitem{note25} Ibid., 24.
\bibitem{note26} Ibid., Vol 1 Ch 1 53.
\bibitem{note27} Ibid., Vol 1 28.
\bibitem{note28} Calvin, \textit{Institutes}, Vol 1 Bk 1 Ch XV §2 174.
\bibitem{note29} Ibid., Vol 1 Ch 1 54.
\bibitem{note30} Ibid., 55.
\bibitem{note31} Santmire, \textit{The Travail}, 126.
\end{thebibliography}
For Calvin, human power over nature was primarily related to the need of subsistence.\textsuperscript{32} Nonetheless, Calvin parted company with Luther on the question of the utility of non-human nature. From a utilitarian perspective he affirmed that, in placing nature at the service of humans, God had provided them with ‘an immense profusion of wealth’.\textsuperscript{33} It was legitimate for humans to take an active role in the exploitation of the world’s natural bounty in order to increase their riches. Calvin affirmed that humans ‘were not intended to observe’ the world ‘as mere witnesses but to enjoy all the riches which are here exhibited as the Lord has ordained and subjected them to our use’.\textsuperscript{34}

Not unlike Luther, Calvin believed that the Earth was cursed because of Adam and Eve’s original sin.\textsuperscript{35} The ‘ruin of man’ extended to ‘all those creatures which were formed for his sake, and had been made subject to him’.\textsuperscript{36} Nevertheless, humans had not completely lost their ascendancy over non-human nature. They retained their mastery over the animals, at least to a certain extent.\textsuperscript{37} For Biéler, the sharing of the Earth in human sin also testifies to the fact that for Calvin ‘man, though fallen from his original nature, does still remain the king and the purpose of all creation’.\textsuperscript{38}

The theology of the parents of the Reformation influenced the theories of Grotius, Locke, and Pufendorf. One of the religious ideas that remained more firmly entrenched in their thinking was the belief in human power over non-human nature. Importantly, they translated that conviction into a legal entitlement to privately appropriate ecosystems. The right to private property gave a concrete institutional form to the exercise of human power over nature. It allowed translating human superiority over non-human nature into a concrete personal power to own and exploit nature. The way they did so will be explain in the next section.

This influence notwithstanding, secularization gradually changed the ideological context in which these writers wrote their works. Tension between the Church and secular power in Europe had existed prior to the Reformation, but the ideas that made possible a sphere of secular power separated from the Church were not yet in place.\textsuperscript{39} Besides, secularization did not entail the demise of Christianity in Protestant societies. Actually, after the Thirty Years War one of the reasons for the rise of an autonomously

\begin{itemize}
\item \textsuperscript{32} Ibid., 54
\item \textsuperscript{33} Ibid.
\item \textsuperscript{34} Ibid., Vol 1 26.
\item \textsuperscript{35} Ibid., Vol 1 Ch 3 114.
\item \textsuperscript{36} Ibid.
\item \textsuperscript{37} Ibid., Vol 1 Ch 9 211.
\item \textsuperscript{38} André Biéler, \textit{Calvin’s Economic and Social Thought}, edited by Edward Dommen, translated from the original French by James Greig (Geneva, World Council of Churches, 2005) 208.
\end{itemize}
The legitimized political realm was the protection of the plurality of religious beliefs that had come into existence after the Reformation. It was rather the influence of the Church in political life that gradually diminished during the seventeenth century.

The materialization of human power over nature: private property—Grotius to Vattel

Hugo Grotius (1583-1645) was born and educated within the elite of the Dutch Republic. His father was a devout Protestant, holding different posts in the government of the city of Delft, including that of major. Grotius was a Calvinist who witnessed with alarm the devastation caused by the religious wars that afflicted Europe at the time. The internal division of Christianity was eroding the possibility of peaceful coexistence between different European commonwealths. One of these divisions affected the Dutch Republic as the Remonstrants or the followers of Jacobus Arminius departed from the teachings of Jean Calvin, inciting a vehement reaction by part of the Dutch society. Grotius’ alleged association with the Arminians was one of the reasons that he found himself condemned to life captivity in 1618.

During his imprisonment at Loevestein Castle, he prayed and read the Bible intensively. He also employed part of his period in captivity writing an apology of the Christian faith, a treatise entitled *On the Truth of the Christian Religion*. In this work, he sought to promote Christian unity by underlining the difference and superiority of Christianity over non-Christian beliefs. In other words, for Grotius, the external boundaries of Christianity were more fundamental than internal divisions. Overall, Grotius’ work evidences a profound sense of tolerance and moderation regarding the Christian faith.

Grotius’ legal and political writing have been described as exhibiting a secularizing impulse. This impulse derives from his conviction of the importance of disentangling religion and politics in order to

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43 Ibid.
44 Heering, *Hugo Grotius as Apologist*, 3-4.
47 See Mark Somos, ‘Secularization in *De Iure Praedae*: From Bible Criticism to International Law’ in Hans W. Blom (ed.), *Property. Piracy and Punishment: Hugo Grotius on War and Booty in the Iure Praedae—Concepts and Contexts* (Leiden, Brill, 2009) 148-191. Somos is careful to note the distinction between a ‘secularizing’ theory and a ‘secular’ one. It is the former not the latter that he identifies in Grotius’ *De Iure Praedae*. Ibid.
avoid future wars of religion in Europe. He favored the intervention of civil authority on religious matters to promote toleration and avoid dogmatism. Though Grotius’ theories might not constitute a sharp break from medieval and late scholastic tendencies, as Vitoria, he applied former theories to the particular circumstances of his era, using traditional arguments for new purposes. In this sense, he provided a conceptual bridge between the late scholastics and modern thinking about natural law. But there is more to Grotius’ deserved reputation. As he declared in the Prolegomena (prologue) of his magnum work De Jure Belli ac Pacis (On the Law of War and Peace), no one before him had produced a comprehensive and systematic treatise on the relations between different commonwealths or their rulers.

Grotius’ ideas about humanity’s place in God’s creation can be found in the Prolegomena of De jure belli. In order to prove the existence of a distinctively human natural law, he drew a clear-cut line between humans and non-human nature. He declared: ‘Man is, to be sure, an animal, but an animal of a superior kind, much further remove from all the other animals than the different kinds of animals are from one another.’ As in scholastic thought, the distinction between humans and animals served Grotius in elaborating particular psychological attributes that were uniquely human in order to demonstrate the exclusive applicability of natural law to the human sphere.

Sociability was one of the attributes that explained humans’ paramount position within creation. Only humans naturally searched for their own good and acted in accordance to general principles. Animal ‘sociability’ was clearly different from that of humans because the former acted guided by ‘some extrinsic intelligent principle’ and not by their own intelligence. In addition to sociability, knowledge and speech were exclusive human faculties. Similarly, Grotius considered the ability to make judgments as further proof of humans’ distinctive rationality. Following traditional Christian theology, Grotius recognized that the Supreme Creator had conferred humans all the attributes that elevated them over non-human nature.

48 Ibid., 150.
50 Ibid.
52 Ibid., Vol II Prolegomena §1, 9.
53 Ibid., Vol II Prolegomena §6, 11.
54 Ibid., Vol II Bk I Ch I §11, 41-42.
55 Ibid., Vol II Prolegomena $6, 11 and $7, 12.
56 Ibid., §7, 12.
57 Ibid.
58 Ibid., §9, 13.
59 Ibid., §12, 14.
The sharp differentiation between human and non-human nature that allowed Grotius to present a convincing conceptual foundation for natural law and natural rights did not resolve the question of the extent of human power over nature. In a more revealing passage about the legality of waging war against pirates, cannibals, and ‘those who act with impiety’, Grotius concurred with Isocrates 'that the most just war is against savage beasts’. By drawing an analogy between barbarians and wild animals, he managed to demonstrate that the former could be killed with the same justice as for inferior creatures. But that statement was made in the context of justifying war against the three categories of people that Grotius considered barbarians. So, even if this affirmation points toward a certain general attitude of Grotius toward animals, it has to be taken with caution.

Grotius’ argumentation on the origin of private property sheds more light on the question of human power over the Earth. The passage of Genesis 1:26-28 on the origin of human dominium became the cornerstone of his view on the matter. For Grotius:

Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature … In consequence, each man could at once take whatever he wished for his own needs, and could consume whatever was capable of being consume. The enjoyment of this universal right then served the purpose of private ownership.

This familiar statement is permeated by the influence of the ideas of a Chain of Being and humans’ paramount place in God’s creation. As already noted, these same ideas had inspired Spanish scholastics’ views about nature. Vitoria and Las Casas argued along the same lines, basing humans’ dominium proprietatis on God’s mandate to master the earth and its non-human creatures. But there were innovative elements in Grotius statement. He indirectly referred to the constitution of a new type of human dominium over nature after the Deluge, something to which Luther had also alluded. Grotius’ account of dominium rerum entailed a direct association between the idea of human mastery over nature and the private entitlement to privatize it and, he added, ‘consume’. The recognition of divine intervention in the formation of private property gave the legal right to use ecosystems for humans’ well-being a very particular connotation, with important social and environmental overtones.

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60 Ibid., Vol II Bk II Ch XX XL. §3, 506-507.
61 Grotius, De Jure Belli, Vol II Bk II Ch II I. 186.
62 Vitoria, De indis, Sect I, §§, 121 and 122; Las Casas, Historia, Vol I Book I Ch I 23.
63 In this Grotius departed from Vitoria, for whom dominium was only created by human law.
As far as power over material existence was concerned, being a proprietor was more important than being human, because the former status was the only one that granted the power to seize and use nature to one’s advantage. Still, at this point of Grotius’ argumentation the human power over nature was circumscribed—as in the writings of Saint Thomas, Luther, and the Spanish scholastics—to the satisfaction of humans’ basic needs.

As with Grotius, Samuel von Pufendorf (1632-1694) was troubled by the European Wars of Religion, and paid close attention to the question of religious toleration. Pufendorf was born at Dorfchemnitz in the Electorate of Saxony. His father Elias Pufendorf was a Lutheran pastor from Glauchau, and Samuel Pufendorf himself was destined for the ministry. He studied theology at the University of Leipzig, but soon abandoned it and pursued legal studies. During his life he occupied different positions in the Universities of Heidelberg and Lund. He also served as Historiographer Royal for the King of Sweden, and at the end of his life, in 1688, Pufendorf was called into the service of Frederick William, Elector of Brandenburg, as historiographer and privy councilor.

Pufendorf lived his adult life in the aftermath of the Thirty Years War, a time in which the emergence of the post-Westphalian order was still under constant threat of attack by the Catholic Counter-Reformation. The fragility of the new religious and political scenario was revealed in 1685 when Louis XI revoked the Edict of Nantes, ending religious toleration in a France that became the champion of the Catholic creed. As a reaction to this event and in defense of toleration, Pufendorf wrote his treatise Of the Nature and Qualification of Religion in Reference to Civil Sovereignty. In this work, published in 1687, while advocating for the separation of civil and religious power, he still provided the Christian Prince with a wide margin for intervention in Church affairs. Princes were even allowed to use force against Muslims, Arians, Anabaptists, and Catholics in defense of the true Christian religion.

Pufendorf sought to provide a Protestant basis for natural law by getting rid of the influence of the clerical-scholastic tradition and the influence of Thomist political theology. He did so by drawing a distinction between moral theology and natural law. Whereas the former dealt with individual

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66 Samuel Pudendorf, Of the Nature and Qualification of Religion in Reference to Civil Sovereignty, translated from the original (London, Printed for A. Roper, 1698).
67 Ibid., 263-266.
68 Ibid., 265.
conscience, inner spiritual states, and matters of revealed truth, the latter’s goal was external conduct and civil political power. But this did not mean that either God or religion had no place in Pufendorf’s natural law. For instance, Christian ideas were of paramount importance in his disquisition about human nature and human power over non-human nature.

Pufendorf explored in-depth the human/animal relationship. There are similarities between his and Grotius’ treatment of animals. As for the Dutch scholar, in De Iure Naturae et Gentium Libri Octo Pufendorf excluded animals from the sphere of natural law. This exclusion resulted from the clear-cut boundary between humanity and other animate creatures set at the beginning of his treatise. By divine design and thanks to its will, humanity was far superior to non-human nature. The reason for the excellence and superiority of humans in the sacred order of things was that they, unlike any other creature, possessed an ‘immortal soul, furnished with the light of intellect’.

Due to their mortal, matter-like existence and great number, Pufendorf saw no need for ‘fostering and guarding the security of animals’. In fact, he stated that ‘some also reproduce in such numbers that they must be exterminated’. There was no room for pity, as Pufendorf believed that it could be ‘sufficiently demonstrated by reason that no scruple is to be admitted about the killing and eating of animals’. The justification of this insensitive attitude was the ‘practical state of war’ that confronted humans and animals. Non-human nature was devalued in opposition to the importance of the human sphere.

In contrast to this manifest anthropocentrism Pufendorf adopted, a more lenient approach to animals appears in other parts of De Iure Naturae, imposing certain restrictions to human power over them. For instance, he maintained that in spite of the extent of human command over non-human nature, nothing justified killing for pleasure. In this, he disagreed with Vitoria, who argued that animals could be killed ‘for sport’. This notwithstanding, it is still worth noting that these limits did not stem from an appreciation of nature’s intrinsic value. Rather, they were based on religious and utilitarian considerations. The ‘useless and wanton destruction of animals’ was an offense against God, who had

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71 Pufendorf, De Iure Naturae, Bk II Ch III §2-§4, 180-183.
72 Ibid., Bk I Ch I §7, 7.
73 Ibid. Book II Ch I §5, 148. For Pufendorf the life of animals is the result of ‘a minute disposition and motion of particles of matter’; Ibid., §4, 148.
74 Ibid.
75 Ibid., Bk IV Ch III §5, 530.
76 Ibid., Bk IV Ch III §23, 526 and §5, 529.
77 Ibid., 530.
78 Ibid., Bk IV Ch III §6, 531.
79 See discussion in Chapter 2, page 103.
bestowed them to humanity. Animals belonged ultimately to the Creator, who ‘is pleased to manifest His power in producing and destroying them’. Besides, in an argument based on sustainability, Pufendorf argued that the destruction of the fauna negatively affected ‘human society’ as it threatened the availability of meat for consumption.

Pufendorf’s conception of human dominium over non-human nature was less anthropocentric than that of previous natural lawyers. He doubted that God had created everything solely for the sake and benefit of mankind, as going by that hypothesis erroneously implied that things which were ‘of no use to man’ were created in ‘vain’. Still, Pufendorf noted that ‘all nature serves man to the further end that he may live his life more advantageously and easily’ and, hence, humans enjoyed considerable power over non-human nature. After the Fall humans were in need of non-human nature for survival. It was then logical, as he argued, that they could use, misuse, or destroy plants and animals for their own benefit.

How did Pufendorf understand the historical process whereby humanity came into the possession of nature? At the beginning of time, he explained, the Earth was in a state of original negative community. Things had not yet been assigned to any particular person, so everything was open to everybody’s use. Then, dominium rerum, a human institution, was introduced either by tacit or express pact. In his own words:

It is true that God allowed man to turn the earth, its products and its creatures, to his own use and convenience, that is, He gave men an indefinite right to them, yet the manner, intensity and extent of this power were left to the judgment and disposition of men; whether, in other words, they would confine it within certain limits, or within none at all...

In principle, unless otherwise agreed, the human power over nature incarnated in the legal institution of dominium was unlimited. It had lost the main purpose (human sustenance) to which the Spanish scholastics and Grotius had constricted it. This amplification of the scope of human dominion over nature

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80 Pufendorf, *De Iure Naturae*, Bk IV Ch III §6, 531.
81 Ibid.
82 Ibid.
83 Pufendorf, *De Iure Naturae*, Bk IV Ch III §2 525.
84 Ibid., §1, 524.
85 Ibid., §3-5, 526-530.
86 Ibid., Bk IV Ch IV §2, 532.
87 Ibid., §4, 536.
88 Ibid.
was based on realist considerations. Humans were insatiable creatures whose desires far exceeded the need of subsistence. Humans craved for ‘luxuries, ambition, honors and the desire to surpass others’.  

The most effective way to fulfill humanity’s desire for material wealth was to divide things. Power over nature was best exercised through private ownership instead of common property. Against Golden Age narratives that underlined the role of private property as an agent of decay, social disintegration, and even conflict and warfare, Pufendorf upheld it for precisely the contrary reason. He believed that human ambition could easily lead to conflict unless the private property of each individual was clearly demarcated. It is worth noticing that Domingo de Soto had already used a similar reasoning to explain the division of common things. The Dominican was convinced that without privatization, human greed would unavoidably provoke conflict and war. Therefore, while Pufendorf linked the institution of private ownership to the achievement of human harmony, thus acquiring a cosmopolitan connotation, private property was also designed to fulfill the desire of material affluence.

John Locke (1632-1704), Pufendorf’s contemporary, was born to a religious family that turned from the ranks of Anglican communicants to those of Calvinist Presbyterians. He grew up as a Calvinist, but through his student years at Westminster School and Christ Church he somewhat detached from his former religious convictions. As his religious views became less dogmatic, he realized that religious intolerance had exacerbated internal political conflicts in seventeenth century England. So, for the same reason as Pufendorf, he decided to present his views on the issue of religious toleration in A Letter Concerning Toleration. He also advocated separate roles for Church and State, defending that both had distinct spheres of jurisdiction. But, unlike Pufendorf, he did not grant special powers to the Christian ruler.

Locke was a Christian and did not doubt his faith. He dedicated most of the first book of his Two Treatises of Government on analyzing and interpreting Genesis. He paid close attention to the question

89 Ibid., Book II Ch I §6, 149-150. See Soto, De iustitia, Book IV 3.1, 296.
90 For Golden Age narratives and their adoption by figures such as Hesiod, Seneca, Plato, Dicaearchus, and Ambrose, see Garnsey, Thinking, 107-135.
91 Pufendorf, De iure Naturae, Bk IV Ch IV § 7, 541. For Soto’s opinion see supra Chapter 3, footnote 127.
93 Ibid., 4-5.
94 John Locke, A Letter Concerning Toleration (Huddersfield, J. Brook, 1796).
95 Miller, ‘The Dawn’, 268-269. Miller concedes that Locke agreed with Pufendorf in the fact that a Christian ruler should not tolerate atheism, Islam, or Catholicism, but whereas the latter reached this conclusion based on religious motives and the need for religious unity, the former is only preoccupied with the challenges that these groups would present to the peace of the civil society.
of human dominion granted by God. His aim was to counter the affirmation of the political theorist Robert Filmer, who defended the divine right of Kings to absolute political power. 97 Concretely, he rejected Filmer’s affirmation that Adam’s jurisdiction over humanity was inherited (by divine right) by his heirs. In order to do so, Locke examined Adams’ title to sovereignty by God’s donation as it was recounted in Genesis 1:28. God had given Adam power over inferior creatures, but not over other human beings. 98 Besides, Adam had never had property rights over the entire Earth or inferior creatures because God donated them in common to all humankind.99

Locke’s analysis of human power over non-human nature was in line with mainstream Protestant theology. God set humans apart from and above all other creatures. By making them in His image, he offered a share of his power over creation.100 Locke believed that after the Flood human dominion over non-human nature was reinstated, albeit in an enlarged manner.101 Human property rights over nature increased as ‘other uses of them are allowed’, Locke argued, ‘which before were not’. This theme was expanded in the second book, where Locke makes a similar claim, namely that ‘God … has given the Earth to the Children of Men, given it to Mankind in common’.102

As Armitage has noted, according to Locke ‘it was necessary for human beings to exercise their physical and their mental labor upon the otherwise inert creation given to them by God … Human beings could neither add to nor subtract from the divine creation but they had a duty to construct it to their own devices, both mentally and physically’.103 In Locke’s theory, private property became the corner stone of the human project to modify and control nature. God had created the world for humans to enjoy in common. But then Locke added ‘by commanding to subdue’ the Earth he ‘gave Authority so far to appropriate’.104 The necessity of utilizing nature for survival made human labor the distinctive factor whereby ‘God’s gift’ was transformed into proprietary rights.

The impact of the secularization of European society in the seventeenth century was not restricted to the separation of the civil and religious spheres. Progressively, natural philosophy or the study of the ‘workings of nature’ started to claim a niche of examination and manipulation of animal species and

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97 Ibid., Book I Ch I §1-5, 159-161.
98 Ibid., Ch IV §24, 175.
99 Ibid.
100 Ibid., §49, 186.
101 Ibid., §39, 185.
102 Ibid., Bk II Ch V §25 304 (italics in the original version). Later he affirms: ‘Though the Earth, and all inferior Creatures be common to all Men.’ Ibid., §26 305. The idea of inferior creatures is linked to the belief in a Chain of Being, or the hierarchical ordering of matter with humans at its apex.
104 Ibid., §35, 310.
natural habitats, independent from the religious mold that had constrained it before. Besides, during the Early Modern Era the boundaries between the natural and the non-natural spheres were redefined.\textsuperscript{105} By the end of the eighteenth century miracles and marvels—the supernatural and the preternatural—had mostly ceased to be part of the realm of the non-natural.\textsuperscript{106} As a result, God’s intervention in creation diminished considerably. Eventually only the artificial remained as a category of the non-natural. But during the seventeenth century the line of separation between the natural and the artificial also withered away, and nature slowly but surely started to be perceived as an artifact.\textsuperscript{107} Enabled and encouraged by this ideological shift whereby nature gained regularity and predictability, scientific speculation flourished.

There was a clear transition from the religious context of the sixteenth century in which Jean Calvin, for example, had naturally claimed that ‘[t]o be so occupied in the investigation of the secrets of nature, as never to turn the eyes to its author, is a most perverted study’.\textsuperscript{108} Partly during the seventeenth century, and more generally during the eighteenth, perversion (borrowing Calvin’s term) became more acceptable. Even if the author of the world could not be completely dismissed, nature was increasingly scrutinized independent of Him. Montesquieu (1689-1755) described that physical world in the opening of his \textit{De L’Esprit des Lois}. That “new” world was formed ‘by the motion of matter and devoid from intelligence’ but still governed by certain rules.\textsuperscript{109} There was a change of emphasis from God as ‘Governor of the world’ to the rules whereby God ‘could govern the world’.\textsuperscript{110}

This important change of perspective was complemented by a more concrete motivation to look at nature with ‘new eyes’. The geographical discoveries of the end of the fifteenth century had revealed a huge number of natural phenomena unknown to Europeans until that time. Old sources of information were no longer useful in revealing the material possibilities of the natural wealth hidden in the landscapes of America. In this sense, the development of a scientific approach to nature was less the result of rational, abstract and uninterested deliberations about reality, but more from a concrete material engagement with it.\textsuperscript{111}

\begin{enumerate}
\item \textsuperscript{106} Ibid., 154-162.
\item \textsuperscript{107} Ibid., 163-165.
\item \textsuperscript{108} Calvin, \textit{Commentaries}, Vol 1, 24-25.
\item \textsuperscript{110} Ibid., 4.
\item \textsuperscript{111} Recent scholarship has revealed the impact on the scientific revolution of the new approach to nature in the colonies connected to the rise of long-distance trade. See, for instance, Harold J. Cook, \textit{Matters of Exchange: Commerce, Medicine and Science in the Dutch Golden Age} (New Haven and London, Yale University Press, 2007). For Alexander, ‘the material
None of these developments amounted to a complete break with Christian doctrine. Actually, such a break was not needed, as rationalism and the pursuit of scientific inquiry were reconciled with religiosity by intellectual figures like Bacon, Newton, and Pascal. Moreover, there was already a certain type of worldliness in Protestant theology. If something, the rise of a worldly approach to reality encouraged the manipulation of the environment even more, reinforcing divinely inspired ideas about human supremacy over non-human nature. All in all, and in spite of the fact that natural philosophy shared with religion the role of ideological mediator between humans and their surroundings, there was still no secular explanation of the creation of the world and the human position within it.

The weakening of religious influence in European society was also visible in the more secular foundations of natural law during the eighteenth century, the period in which natural lawyers like Christian Wolff (1679-1754) and Emer de Vattel (1714-1767) wrote their important contributions to the history of international law. Neither of these authors conceived natural law as completely independent from the existence of God. They still regarded God as its ultimate foundation, but in the case of the natural world, it was a distant source. Because it was impossible to know God’s will, the authority of the
details of the world as perceived by the senses became the foundation for a new approach to knowledge. In turn, it owned much to the acquisition and transmission of accurate information. It was from encounters with nature and its goods, and with like-minded persons, more than from attempts to rise above life on earth, from desire and interest more than intellectual distance, from warm hope of material progress and gain more than otherworldly aestheticism, that natural knowledge was transformed. Countless people were involved in the production, accumulation, and exchange of the natural knowledge upon which commerce depended, and the high value they place on accurate description of the created world—those “matter of fact” that would be true in any circumstance—became a measuring stick according to which they could judge other forms of knowing.’ See Amir R. Alexander, Geometrical Landscapes: The Voyages of Discovery and the Transformation of Mathematical Practice (Palo Alto, Stanford University Press, 2002).

112 Roger Bacon (1561-1626) is perhaps the most famous exponent of the reconciliation between faith, reason, and science. He reformulated the concept of human mastery over nature, inherited from Christian thinking, so as to legitimize scientific inquiry. For Bacon, the human expulsion from paradise deprived humanity of both its innocence and its control over nature. These two setbacks, he believed, could be respectively restored by the separate realms of religion and natural philosophy. Bacon could have framed the recovery of human grace as a mere moral enterprise. However, he decisively formulated it as a scientific project: ‘By casting his plea for scientific progress in a familiar religious mould he managed to win wide acceptance for a novel conception of mastery over nature, and at the same time he unwittingly charted a course for latter generations which led to the gradual secularization of this idea. His contention that science shared with religion the burden of restoring man’s lost excellence helped create the climate in which earthly hopes flourished at the expenses of heavenly ones.’ See William Leiss, The Domination of Nature (Montreal and Kingston, McGill-Queens University Press, 1994) 49-53. See also Glacken, Traces on the Rhodian Shore, 472.


115 As Wolloch has put it: ‘Nature as a dispassionate and objectively operating mechanism seemed a much more compliant mistress than its medieval image as an inscrutable divine manifestation had been.’ Wolloch, History and Nature, 3. Hardt and Negri believed that: ‘There is a strict continuity between the religious thought that accords a power over nature to God and the modern ‘secular’ thought that accords the same power above nature to Man ... Like God, too, this transcendent figure of Man leads quickly to the imposition of social hierarchy and domination.’ See Michael Hardt and Antonio Negri, Empire (Massachusetts, Harvard University Press, 2000) 91.
law of nature derived ultimately from the nature of ‘Man’ and things.\textsuperscript{116} In the environment of the Enlightenment, reason rather than God became the basis for the law of nature.\textsuperscript{117}

Christian Wolff was born in 1679 in the city of Breslau, the historical capital of Silesia, which at the time was a Protestant part of the Hapsburg Austria.\textsuperscript{118} Following his father’s footsteps, he received a Lutheran education.\textsuperscript{119} Following his father’s will he studied Divinity at the age of twenty, but soon started to divert his academic attention to Mathematics and Natural Philosophy due to their non-ideological method.\textsuperscript{120} In the course of his studies he also developed a high esteem for philosophy, a branch of human knowledge in which he saw the potential for fostering peace in the midst of religious conflict.\textsuperscript{121}

In 1707 he started teaching Mathematics at the University of Halle, soon acquiring a remarkable popularity among students.\textsuperscript{122} His intellectual reputation together with his defense of the power of reason as the foundation of human life alarmed his rival Pietist colleagues at Halle, particularly Professor Joachim Lange, who also resented his academic success. Wolff’s position at Halle became compromised after he delivered a farewell speech as Vice-Rector of the University entitled \textit{Oratio de Sinarum philosophia practica} (Discourse on the Practical Philosophy of the Chinese) in which he praised Confucianism.\textsuperscript{123} Eventually, in 1723, after having lost the favor of King Frederick William I, he was dismissed from his position at Halle by royal decree, only to make a triumphant return in 1740 after Frederick’s death.

Although Wolff defended a secular framework for all ethics independent of human sinfulness and the need for grace, his thought was far from being part of an Enlightenment secular rationalism.\textsuperscript{124} Wolffian rationalism encouraged free intellectual reflection while still anchoring reason to transcendental ideas.\textsuperscript{125}

\begin{thebibliography}{99}
\bibitem{117} Ibid., 68.
\bibitem{119} Ibid.
\bibitem{120} Ibid.
\bibitem{124} Larrimore, ‘Orientalism’ , 200.
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In his metaphysical philosophy, reason was an instrument for the attainment of virtue and felicity as it helped in climbing the ladder that led to the divine perfections.126

Unlike Grotius, Pufendorf, and Locke, Christian Wolff127 introduced the legal institution of dominium rerum in the first chapter of his Jus Gentium Methodo Scientifica Pertractatum without making reference to its religious origin.127 Even in the chapter devoted to ownership by nations there is no reference to the Genesis, human dominion over non-human nature, or the need to replenish the Earth after the Fall and the Flood.128

Born in Couvert, Switzerland in 1714, Emer de Vattel was the fruit of the marriage between an ennobled Protestant minister and the daughter of a high rank official of the Prussian Court.129 After having completed a degree on humanities and philosophy at the University of Bâle, Vattel moved to Geneva at age 19 to further his education in the fields of theology and metaphysics.130 Under the impact of the thought of Christian Wolff he developed an attraction to philosophy and literature.131 That influence would continue well into adulthood, a fact that he acknowledged in the preface of his work Droit des Gens ou principes de la Loi Naturelle appliqués à la conduite & aux affaires des Nations et des Souverains (1758).132 After his years as a student his economic situation deteriorated. To make ends meet, he unsuccessfully offered his service as a diplomat to King Frederick the Great. Ultimately, he obtained the patronage of the Count of Brühl, First Minister of Saxony, and in 1749 he was assigned to Bern as the Minister Plenipotentiary for Saxony. Only after the publication of Droit des Gens Vattel was offered a position that could satisfy his professional ambition as chief adviser of the Government of Saxony on foreign affairs.

Christian theology and morality were predominantly absent from the Droit des gens. In one of the few references to God in the manuscript, Vattel followed the path outlined by Grotius, Locke, and Pufendorf, explaining the origins of private property and human power over non-human nature by reference to the Christian God. He asserted that ‘the earth belongs to mankind in general’ because it was given in common

126 Ibid., 267.
127 Wolff mentions private property for the first time to draw an analogy in his discussion about the relations between powerful and less powerful nations. See Wolff, Jus Gentium, Ch I §84 49. The first substantive examination of private property takes place soon after this example, when Wolff moves to analyze the occupation of sovereignty in uninhabited territory: Wolff, Jus Gentium, Ch I, §85, 50.
128 Ibid., Ch III, §274-367, 140-190.
130 Ibid., 242.
131 Ibid.
132 I have used as a reference the English translation of Vattel’s text. See supra Chapter 2, footnote 104.
to it by the Creator. God appeared little elsewhere in Vattel’s scholarship, but the allusion to divinity in this passage evidences a justification for the human power over nature still based on Genesis.

After making a reference to God’s mandate of dominion, he introduced the division of things whereby what was general became particular. In the case of Vattel the partition of the Earth was motivated not by the fulfillment of a divine purpose, but by practical reasons. As the world’s population grew there was a compelling need to transform and render nature more fertile, which explained the change from common to private property. The individual enjoyment of property contributed to human happiness. It was also the way to procure ‘all the necessaries of life, with its conveniences and innocent and laudable enjoyments’. This was a recurrent idea since the period of the Spanish scholastics. Privatizing the world was the more efficient way of producing what humans needed to survive. The assurance of personal enjoyment of what one has produced encouraged work and helped avoid conflicts. In this sense, the community was no longer needed. Eventually, natural law theorists like Pufendorf or Vattel expanded this notion of survival, widening the spectrum of human needs so as to include the desire to enjoy increasing amounts of material wealth.

To sum up, the influence of Christianity on the conception of dominium rerum in the law of nations during the seventeenth and eighteenth centuries was notorious. With the exception of Wolff, the biblical account of the Earth’s creation inspired the way in which the relation between humanity and nature was framed and understood. This common religious treatment of the historical origins of the institution of private property did not result in a monolithic narrative. Different authors diversely explained the way in which private property naturally stemmed from God’s creation of the world and the human power over it. Whereas Locke and Vattel, for instance, derived private property directly from humans’ use of nature, Grotius and Pufendorf explained the shift from common to private property in terms of human contract (by agreement). Different authors offered different reasons for the divisio rerum, putting the emphasis on cosmopolitan values, the imperatives of population growth, or the demand of efficiency.

All in all, the power that dominium rerum conferred to the proprietors of the natural world was expressed by legal scholars in hierarchical terms. Notwithstanding the superiority of humans over non-

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134 Ibid.
135 Ibid., Book I Ch VI §72 35.
136 On these differences and the ambiguity of Grotius and Pufendorf with regard to the use of covenant and occupation as alternative origins of property see Fitzmaurice, *Sovereignty*, 91-98 and 107-124.
137 These religious influences were in consonance with the emergence of European modernity, which equally emphasised human ascendancy over nature: ‘At the scene of the birth of European modernity, humanity discovered its power in the world and integrated this dignity into a new consciousness of reason and potentiality.’ See Hardt and Negri, *Empire*, 71. That said,
human nature, there was still no necessary link between particular Christian ideas about nature, their inclusion in the law of nations, and the destruction of natural habitats in European overseas possessions. Moreover, several commentators related human ascendancy over the Earth to the need of human subsistence. The exception was Pufendorf, who gave free hand for human environmental power as the only way to fulfill the panoply of human desires. Humanity could use nature at its convenience.

In principle, nothing in the development of the law of nations during the seventeenth and eighteenth centuries suggested that individuals, corporations or states were given carte blanche to exploit nature. However, in practice, the considerable economic benefits derived from the privatization and exchange of natural resources—obtained in European colonies—in an expanding international market avid for all kind of commodities and luxuries encouraged Grotius and later authors to reconcile their religiously inspired doctrine of *dominium rerum* with the accumulation of wealth. The question of how the world was originally divided and the institutional way in which human power over nature could be exercised acquired a special relevance, and had practical implications in the context of European imperialism and colonial expansion.\footnote{This fact did not go unnoticed. As Garnsey reminds us, the contributors to property theory of the early Enlightenment ‘wrote with more than one eye to the controversy over the legitimacy of the colonial enterprise’. See Garnsey, *Thinking*, 137.} Grotius established the legal foundation for the involvement of charter companies in long-distance trade, and Locke advocated monetary investment as a way to promote commercial agriculture in North America. Eventually, the imperative of capital accumulation became the final arbitrator of the question of how much and how deeply nature could be utilized, or—in the language of the time—‘improved’.

Once they became reconciled with capital accumulation, Christian ideas about nature and the legal doctrines in which they found expression created the ideological possibility for the exploitation of the environment. Although the ideological religious stratum of these theories did not per se necessarily lead to natural degradation, it operated within a larger global social canvas in which economic imperialism and capitalist expansion were gaining momentum. In this milieu, the divine mandate to improve and master nature linked by Grotius, Pufendorf, Locke, and Vattel to the institution of private property was reconciled with the economic interest of European nations and private actors to seize and exploit natural resources for profit, which pushed religious ideas that allowed humans to control nature in an

one needs to be cautious when making sweep generalisations about such a vast period, as there were, for example, key intellectual figures of modernity that had a general positive view about nature, such as Spinoza, Emerson, Thoreau, Kropotkin, and Heidegger. See Bill Devall and George Sessions, *Deep Ecology: Living as if Nature Mattered* (Salt Lake City, Peregrine Smith, 1985). For a similar attempt to balance Western environmental thought see John M. Meyer, *Political Nature: Environmentalism and the Interpretation of Western Thought* (Massachusetts, The MIT Press, 2001).
unsustainable direction.\textsuperscript{139} That accommodation was facilitated by the gradual secularization of authority that took place in the context of the Reformation, which left the mercantile class more free to pursue its worldly interests.\textsuperscript{140}

Imperial power over nature neglected meanings, values, and services that could not be translated into economic terms. This change deeply affected pre-colonial North American societies. The vigorous assault on colonial habitats was the result of the historical intersection of three major and rather complex (some older, some novel) phenomena. The first was the Christian understanding and sanction of human power over nature. That was the conceptual substratum of a rationalist and secular turn in European thinking that emphasized that power and eventually set it free from previous constraining limits. And that turn was further strengthened by the need to study and quantify the natural habitats that colonization brought within the sphere of European influence in order to obtain economic advantage from their exploitation.\textsuperscript{141}

Once the religious idea of taming wilderness and mastering nature encouraged North American colonists to transform their surroundings, and the desire for profits pushed them further down that road, it became particularly difficult to differentiate the ‘improvement’ of nature from its actual degradation. If modifying the environment was not only religiously appropriate (the fulfillment of a sacred mandate) but also economically desirable (for reasons of efficiency), there was no external ideological point of reference for the colonists’ ideology from which to draw a line in order to discriminate between both behaviors. In practice, the economic forces unleashed by colonization drew that line in such a way that sustainability was largely abandoned in the pursuit of riches, power, and status.

\textit{Turning ecosystems into commodities: international trade—seventeenth to eighteenth centuries}

In his search for just titles that could serve as legitimate basis to regulate the relations between the Crown of Spain and its American territories in the sixteenth century, Francisco Vitoria had formulated a right to

\textsuperscript{139} Moreover, as Tully has shown, the European concept of private property did not make justice to the original conditions of land use in North America. Hence, its introduction in the law of nations imposed an alien conception with the result of subjecting and dispossessing North Americans. See James Tully, ‘Aboriginal Property and Western Theory: Recovery a Middle Ground’ in David Armitage (ed.), \textit{Theories of Empire 1450-1800} (Aldershot, Ashgate, 1998) 345-372.

\textsuperscript{140} Max Oelschlaeger, \textit{The Idea of Wilderness: From Prehistory to the Age of Ecology} (New Haven, Yale University Press, 1991) 75.

\textsuperscript{141} This last factor was the result of the growing importance of material wealth in European culture and the power attached to the status that often came with it. For Pufendorf, the lack of riches forced ‘poorer men to make furtive advances, in order to secure the favor of the more wealthy, and to submit themselves to them, either so that the latter may do them no harm, or else that they may confer on them some benefit’. Pufendorf, \textit{De Iure Naturae}, Bk III Ch II §9 345.
free intercontinental trade that belonged to all commonwealths as part of the *ius gentium*. In the context of the Spanish conquest of America and the expansion of trade in the Atlantic, that right offered concrete legal grounds whereby the Western Hemisphere was forcibly incorporated into global networks of trade. In the following centuries, the assertive commercial push of the Dutch and the English maritime empires, their rivalry, and the rising awareness of the link between intercontinental commerce and the wealth of nations furthered the development of legal doctrines that elaborated on or departed from the ideas of Vitoria and the School of Salamanca.

Hugo Grotius was the main legal advocate for Dutch trade imperialism and its commercial strategy of surplus extraction. On his mother’s side of the family, some of Grotius’ relatives had been for years trading with the East Indies, and later became implicated in running the Dutch East Indian Company (*Vereenighde Oostindische Compagnie* or VOC). These early personal ties of affinity and his expert legal knowledge were the reasons why in 1603, still in the early period of his career, the Amsterdam directors of the Dutch East Indian Company requested his services to write a legal defense of the apprehension of a Portuguese vessel, the Santa Catalina, in the East Indies. As the Dutch started to clash with the Portuguese seaborne empire, they adopted its organizing principles, albeit in a modified way, substituting an obsolete state capitalism with more dynamic and adaptable forms of economic organization based on private corporations (such as the VOC) backed by state power.

In response to the VOC’s invitation, Grotius produced his famous treatise *De Iure Pradae* (The Law of Prize and Booty) also known as *De Indis*. His support for the company did not end with that service. He was also a successful lobbyist, gaining political, diplomatic, and military support from the United Provinces. One of the main objectives of Grotius’ treatise was to provide the VOC with legal ammunition to challenge and eventually inherit the Portuguese trade monopoly in the East Indies. In order to do so, he argued that the Portuguese were neither the original owners of the territories visited by the Dutch, because those lands already belonged to the peoples of the East Indies, nor the possessors of

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142 Münkler, *Empires*, 49.
146 The original title intended by the author was, as we now know, *De Rebus Indicis*. The implications of the discrepancy between the authors’ preference and the editor’ choice is examined in E. M. Wilson, ‘On Heterogeneity and the Naming of De Indis of Hugo Grotius’ 1 *Journal of Philosophy of International Law* (2006) 72-115, 76.
147 Ittersum, *Profit*, xix, xxii.
a legal title over them. But challenging the legality of the Portuguese East Indian possessions was not enough to fully protect Dutch commercial interests—Portugal could have claimed jurisdiction over the seas and forbid Dutch navigation. It was crucial to anticipate that possibility, so Grotius’ theory of the freedom of the seas presented in Chapter XII of De Iure Praedae, called Mare Liberum (The Free Sea), served that purpose. Following Fernando Vázquez de Menchaca, Grotius differentiated sovereignty over the sea from sovereignty over the land. According to him, and following Roman law, unlike other physical spaces, the sea could not be appropriated because ‘it is so vast that no one could possibly take possession of it, and since it is fitted for use by all, “with reference to purposes of navigation and to purposes of fishing, as well”’.

Opening the Portuguese monopoly to Dutch trade was not Grotius’ only concern. It was likely that the VOC envoys faced military opposition in the open waters of the East Indies. If the VOC’s commercial enterprise was to succeed, the company would need to exercise military force in a similar fashion to states. Grotius responded to this demand through a theory of private war that guaranteed individuals the right to use force, punish, and wage war. Those rights, inherent to the individual in the state of nature, were not lost after the constitution of a civil society. This notwithstanding, Grotius was careful to circumscribe their ambit of application, as their universal validity could have been turned against the state. Hence, he asserted that within a civil society individuals had to submit their disputes to civil tribunals. Private war was only possible in situations akin to the state of nature, that is to say ‘when in a given place there is no one possessing jurisdiction, a state of affairs which may exist in desert lands; on islands on the ocean or in any region where the people have no government’. These were precisely the kind of scenarios that the VOC was likely to find in its overseas expeditions.

The final piece of Grotius’ work was the legitimization of the relationship between the Christian Dutch Republic and the East Indies’ infidel princes. It was common practice for the VOC to sign preferential trade agreements with Asian rulers, encouraging them to break previous commercial ties with the Portuguese. But the question remained whether it was justified to ally with non-Christians against

149 Richard Tuck, The Rights of War and Peace: Political Thought and International Order from Grotius to Kant (Oxford, Oxford University Press, 1999) 91. For Menchaca’s influence on Grotius see Brett, Changes, 69-70.
151 Porras, ‘Constructing’, 788. Grotius, De Iure Praedae, Ch VIII 87.
152 Ibid., Ch VIII 88.
153 Tuck, The Rights, 92.
other Christians. This possibility created unease among certain sectors of the Dutch Protestant society.\textsuperscript{154} Bearing that in mind, Grotius purposely based his defense of this practice on religious grounds, invoking St. Augustine’s doctrine of love toward one’s neighbors. He expanded the meaning of neighbor to encompass every human being. In Grotius cosmopolitan vocabulary, loving humanity became compatible with the expansionism of a trading colonial power seeking to increase its sphere of economic influence. In addition, he presented a more realist justification, asserting the justice of allying and signing treaties with infidels ‘for the purpose of defending one’s own right’.\textsuperscript{155} Finally, Grotius used all his persuasiveness to portray the inhabitants of the East Indies as fully civilized while depicting the Portuguese and Spanish as cruel and barbaric.\textsuperscript{156} It was then easier to convince his audience that liberating the former from their tyrannical masters amounted to a heroic act.

Grotius fine legal architecture was jeopardized by a reconfiguration of forces in the colonial setting of the East Indies. His theory of the free seas had opened the door for the arrival of a competing commercial power, the English, represented by the English East India Company (EIC), which soon clashed with the VOC. The English and the Dutch resolved their confrontation in colonial conferences in 1613 and 1615. At the conferences, the English used a line of argumentation inspired by Grotius’ doctrine of free trade and navigation.\textsuperscript{157} Richard Hakluyt had translated Grotius’ \textit{Mare Liberum} between 1609 and 1616, probably at the request of English East Indian Company.\textsuperscript{158} Mindful of the East Indian context, Hakluyt also took into account when writing his translation that the right to free trade was being used to justify the English colonization of Virginia.\textsuperscript{159}

In response, Grotius appealed to the legal principle of \textit{pacta sunt servanda}, blaming the English for encouraging the inhabitants of the Spice Islands to break contractual relations with their previous Dutch allies.\textsuperscript{160} Grotius avoided incurring a contradiction by reformulating his previous argument in \textit{De iure praedae} for assuring the maintenance of the VOC’s hegemony in the spice trade.\textsuperscript{161} At the time, there were reports of Dutch violence and several cases of harassment and intimidation in the East Indies.

\begin{itemize}
\item \textsuperscript{154} Ibid.
\item \textsuperscript{155} Grotius, \textit{De Iure Praedae}, Ch XIII 315.
\item \textsuperscript{156} Ittersum, \textit{Profit}, 53-104.
\item \textsuperscript{157} Ibid., 360.
\item \textsuperscript{158} Fitzmaurice, \textit{Sovereignty}, 71.
\item \textsuperscript{159} Ibid.
\item \textsuperscript{160} Ittersum, \textit{Profit}, 361-362.
\item \textsuperscript{161} Ibid., 370.
\end{itemize}
However, Grotius ignored allegations of a disproportionate use of force, which could have justified breaking legal ties with the Dutch.\footnote{Ibid., 483, 489.}

Trade was a central concern for Grotius in *De iure praedae*.\footnote{See Porras, ‘Constructing’, 32.} Its objective was, according to him, the creation of profit among the wealthiest citizens, as the accumulation of economic power naturally engendered the benefit of the state and its population.\footnote{Grotius, *De Iure Praedae*, Ch XV 339.} But Grotius’ theory of trade was not only based on practical considerations. Commerce was also in line with God’s will. Moreover, it contributed to human friendship.\footnote{Ibid., Ch XII 218 and Ch XV 356. This is the kind of cosmopolitan values that were present in Francisco Vitoria’s defense of the Spanish right to trade in America as part of humankind’s natural communication.} This sort of cosmopolitan reasoning extended to nature, which ‘by means of the winds … brings together peoples’ and ‘distributes the sum of her gifts throughout various regions in such a way as to make reciprocal commerce a necessity for the members of the human race’.\footnote{Ibid., Ch XII 218.} Ironically, nature was used to validate a kind economy based on the exchange of commoditized natural resources that ended up encouraging its destruction.

Grotius allowed recourse to war in order to secure trade and control supply and prices. The use of force was legitimate because, for the Dutch scholar, protecting commerce was equivalent to defending God’s plan, human love—expressed in friendship—and nature. Grotius’ favorable view of war was not surprising considering that the economic benefits of peaceful trade dwarfed in comparison to the returns that could be obtained from the appropriation of the Portuguese colonial possessions in the East Indies.\footnote{Ittersum, *Profit*, 481.}

Grotius theories cloaked both the direct and indirect violence that the VOC exercised in the East Indies through the imposition of unequal trade conditions. In addition, the activities of the VOC had an adverse environmental impact on the habitats of the East Indies as Dutch intercontinental trade increased the incentive to exploit natural products that would satisfy the demand of expanding European markets.

Taiwan was the place in which the impact of the VOC on the landscapes of the East Indies was manifest. In the fifteenth and sixteenth century, Taiwan’s rich biodiversity and dense vegetation provided a fertile habitat to 100,000 Taiwanese people. The Taiwanese practiced shifting cultivation under a regime of common property,\footnote{Richards, *The Unending Frontier*, 99} notwithstanding particular families enjoying exclusive use rights over tracts of land.
on a seasonal basis.\textsuperscript{169} They complemented their diet by hunting, fishing, and gathering, which reduced agriculture’s environmental impact on the land.\textsuperscript{170}

In the early seventeenth century, the VOC made a violent entry into Taiwanese history, establishing a permanent colony on the island in an attempt to monopolize the profitable trade of the region.\textsuperscript{171} After ‘pacifying’ the population of the island, the Dutch imposed a series of treaties on three hundred Taiwanese villages, which all accepted, whereby they were compelled to submit to Dutch rule.\textsuperscript{172} The Dutch were not satisfied with the simple subsistence economy of the island, and sought to create markets and increase the yields of Taiwanese agriculture. For that purpose, they started exploiting the commercial possibilities of different Taiwanese goods. One of the products that proved most profitable was deerskin. Its export, in huge quantities, contributed to the decimation of deer populations in the southwest of Taiwan.\textsuperscript{173}

The Dutch also tried to modernize Taiwanese subsistence agriculture so that they did not have to import Chinese rice in order to feed their garrison on the island.\textsuperscript{174} Unsatisfied with the slow advances made by the Taiwanese, the Dutch changed their strategy and tried to attract Chinese settlers by providing capital for land clearing and offering tenancy rights.\textsuperscript{175} By 1661, 35,000 more inhabitants had added 9,800 hectares of cultivated land to the total area under agricultural exploitation. These changes did not produce environmental havoc because there was a vast area of unreclaimed land to be exploited. But they certainly did intensify the ecological footprint of the Taiwanese population, affecting the ecological balance and population dynamics of the island. Chinese migrants were attracted to Taiwan by the economic prospects of exploiting its rich natural frontier.

Environmental change in Taiwan was the result of the Dutch’s maximizing approach to the use of the island’s natural resources. Eventually Chinese settlers expelled the Dutch, but nevertheless maintaining the same economic approach to the Taiwanese natural environment. By the mid seventeenth century, because of overhunting and destruction of habitat the deer trade collapsed, forcing pre-colonial Taiwanese to look for alternative sources of livelihood.\textsuperscript{176}

\textsuperscript{169} Ibid.
\textsuperscript{170} Ibid.
\textsuperscript{171} Ibid., 101.
\textsuperscript{172} Ibid., 102-103.
\textsuperscript{173} From 1635 to 1660, the amount of deerskins exported averaged 65,525 units per year. Ibid., 103.
\textsuperscript{174} Ibid., 104.
\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid., 110.
It is difficult to exactly quantify the environmental impact of Dutch commercial expansion due to the fact that the Dutch, unlike the Spanish, did not in general directly exploit natural resources. Instead, they generated the incentive for others to do so. This notwithstanding, Richards maintains that ‘Dutch long-distance maritime trade had cascading effects on landscapes and peoples throughout the early modern world. The tiny population of the republic had an impact on the early modern world’s natural environment far disproportionate to its size.’

More than a century after Grotius’ death Emer de Vattel, a Swiss diplomat and a great admirer of the British Empire, published one of the most influential books on the law of nations of the eighteenth century. Similarly to Grotius, commerce occupied a paramount place in Vattel’s conception of the law of nations. That was natural considering the growing importance of long-distance trade for European polities since the ‘era of discovery’ at the end of the fifteenth century. In the course of the seventeenth century, the nature of trade also underwent a change, with the direct intervention of territorial states in the incipient global exchange economy. By the end of the eighteenth century, this trend consolidated, making competition in global markets a question of states. This paramount shift influenced Vattel’s treatment of commerce in his disquisitions on the law of nations.

As he admired Wolff, Vattel placed the attainment of perfection as the highest goal that a political community of individuals (state) or states (international order) could achieve. The perfection of a civil society consisted in guaranteeing the happiness and felicity of all its members. To that end, he presented a utilitarian recipe for the perfection of a nation, consisting of a cocktail of private property, justice, and security against external violence. The role of the state in that scheme was twofold. On the one hand, it ought to guarantee and protect individual freedom. On the other hand, it had to encourage economic life by promoting labor, industry, the development of personal abilities, and by ‘proposing honors, rewards’ and ‘privileges’.

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177 Ibid., 47.
178 See supra Chapter 2, footnote 105.
180 Ibid., 6-7.
182 Ibid., §15 4.
183 Ibid. A similar statement cab be found in Ibid., Ch VI §72 32.
184 Ibid., Ch VI §76 34.
185 Ibid.
Even though for Vattel agriculture was the hallmark of a nation’s economic prosperity, trade was necessary so that nations could obtain what they did not produce.\[186\] Besides, he did not fail to notice the cosmopolitan potential of trade. It could foster peace in the inter-state European order while bringing economic prosperity to European nations.\[187\] There were several other benefits derived from markets. For example, internal trade contributed to the circulation of money, industrialization, laboriousness, and population growth. International trade, on its part, increased ‘the riches of a Nation’, and could ‘become the source of wealth and plenty’.\[188\] Due to the importance of trade for the economic life of a nation, Vattel regarded both home and foreign trade as incumbent upon individuals and nations, rather than their prerogative and free choice.\[189\]

For Vattel trade was intimately connected to the institution of private property.\[190\] Logically, once private property was institutionalized, free trade became the only way in which ‘economic communication’ between individuals could take place, so that everybody got what was needed to survive and prosper.\[191\]

Vattel’s treatment of commerce between nations evidences a pervasive tension between community values and individual freedom, between the cosmopolitan attainment of happiness through trade and the sovereign right of each nation to decide to what extent it would walk the internationalist path.\[192\] Vattel was aware that behind the commercial wheels that were driving humanity toward increasing pleasure and plenty lay hidden the threat of Empire.

At the outset of the chapter on the mutual commerce between nations, Vattel argued that ‘Mankind in general’ gained from trade.\[193\] Consequently, he agreed with Grotius that when the Portuguese sought to exclude ‘all other European nations from any commerce with the Indians’ they were committing a gross

\[186\] Vattel, *The Law of Nations*, Bk I Ch VII §77 34 and Ch VIII §83 37.


\[189\] Ibid., §86-§87 37-38.

\[190\] Ibid., Ch VI, §72 32-33.

\[191\] Ibid., Ch VIII §88 37.

\[192\] Porras has emphasised the tension between the duty of self-preservation and that of assistance to others that pervades Vattel’s account of trade. See Porras, ‘Appropriating Nature’, 658.

injustice.\textsuperscript{194} This judgment was based on the ‘right of all nations’ to trade with one another in freedom, what Vattel called the ‘freedom of trade’.\textsuperscript{195} This was ‘in general’ the right and duty of all nations.\textsuperscript{196}

But state sovereignty limited the extent to which the power of free trade could encroach upon nations’ liberty. It was a prerogative of the state to decide whether to trade or not and to set its exact bounds.\textsuperscript{197} Ultimately, Vattel affirmed that in case of collision the duties of a nation ‘to herself’ were ‘paramount to her duties to others’.\textsuperscript{198} Treaties gave the format where the competing interest of nations could be balanced while assuring the respect for their individual will.\textsuperscript{199}

The same tension that was at work in Vattel’s treatment of trade between nations affected his position on commercial imperialism. Because trade could be curtailed in case a nation did not derive sufficient advantage from it, Vattel believed that ‘[w]hen the Spaniards attacked the Americans, under a pretense that those people refused to traffic with them, they only endeavor to throw a colorable veil over their own insatiable avarice’.\textsuperscript{200} In contrast to this anti-colonial position, he praised the Dutch and English commercial empires:

\begin{quote}
Holland has amassed immense sums in her marshes; a company of her merchants possesses whole kingdoms in the East, and the governor of Batavia exercises command over the monarchs of India. To what a degree of power and glory has England arrived! Formerly her warlike princess and inhabitants made glorious conquest, which they afterwards lost by those reverses of fortune so frequent in war; at present, it is chiefly commerce that places in her hand the balance of Europe.\textsuperscript{201}
\end{quote}

It is ironic that Vattel perceived so clearly the contradictions of using free trade as an instrument of Spanish and Portuguese imperialism while failing to recognize the negative implications of the Dutch and English commercial dominance of the East Indies based on the legality of the freedom of commerce.

Vattel’s statement followed a long tradition of demonizing the Spanish Empire in order to disassociate the reputation of other colonial powers from its excesses. It was less—if at all—related to a real preoccupation for the wellbeing of American peoples. His denunciation brought to light the excesses

\textsuperscript{194} Ibid., Bk II Ch II §24 144 [emphasis in the original].
\textsuperscript{195} Ibid.
\textsuperscript{196} Ibid., §25 144.
\textsuperscript{197} Ibid., §25 144.
\textsuperscript{198} Ibid., Bk I Ch VIII §85 37 and Book II Ch II §25 144.
\textsuperscript{199} Ibid., Bk I Ch VIII §85 37.
\textsuperscript{200} Ibid., §25 144.
\textsuperscript{201} Ibid., Book I Ch VIII §85 37.
enticed by Habsburg imperial ambitions. In contrast, his double standard obscured the subtle economic domination and structural violence of mighty trading empires that derived their hegemonic position from the imposition of advantageous terms of trade through treaties backed by the threat or use of military force when necessary.

According to Vattel, nations could restrict their freedom of commerce in favor of other nations. And because the reason for nations to trade was not only the procurement of ‘necessary or useful articles, but also’ to turn commerce into a ‘source of opulence’, monopolies were also legitimate so long as the profit extracted from the commercial advantage they were provided was not exorbitant. The Dutch treaty with the King of Ceylon was an example of how a monopolistic agreement could result in the moderate enrichment of the Dutch Empire while creating an advantage for all nations. Vattel borrowed his arguments about monopolies and even the example he used from Pufendorf’s exposition of the same topic in De Jure Naturae.

At this point of his argumentation, Vattel introduced a crucial distinction between trade in goods that were necessary for survival and those that were considered as luxuries. Whereas it was legitimate to profit from the latter, nations could not raise the price of ‘the necessaries of life’ to an excessive level. Greed was acceptable in the first case, but unacceptable in case of those things that were vital for subsistence. Trespass of that limit gave other nations a right to intervene or, as Vattel put it, ‘to reduce a greedy oppressor to reasonable terms’.

In contradistinction to Grotius and Vattel’s endorsement of colonial trade, Pufendorf and Wolff are said to incarnate a legal and moral cosmopolitanism that can be counted as one of the ‘great intellectual achievements of modern European legal theory’. Their high consideration derives in part from the fact that they defied Eurocentrism, taking the side of non-European peoples. Although there is a degree of truth in this affirmation, their cosmopolitanism is, nonetheless, more ambiguous than it seems at first glance. In fact, Pufendorf devoted scarce attention to the colonies. In his magnum treatise of more than 1,300 pages, references to colonies can be counted on one hand. And even if Wolff and Pufendorf

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202 Ibid., §32 146.
203 Ibid., §33 147.
204 Ibid.
205 Pufendorf, De Iure Naturae, Bk IV Ch V §10 567.
206 Ibid., §33 147.
207 Cavallar, ‘Vitoria’, 209.
208 This is the opinion not only of Cavallar but also of Tuck. See Tuck, The Rights, 154-158 and 190-191. For a contrasting view of Wolff, see L.C. Green and Olive P. Dickason, The Law of Nations and the New World (Alberta, The University of Alberta Press, 1989) 62-73.
strongly advocated nations’ equality (something that Vattel also did), they used double standards, denying at times uniform treatment to some non-European peoples and territories.

So, for instance, Pufendorf was critical of Spanish imperialism and, accordingly, criticized Vitoria with regard to the right to free trade. He was especially vocal against the cosmopolitan value of human communication that Vitoria had invoked as legitimate basis for Spanish commerce in America. Pufendorf was aware that if carried to its end point this principle could result in imperialist tendencies, and if applied to the European context it could erode the fragile structure of national sovereignty that had emerged from the mid seventeenth century after the Peace of Westphalia. Although he was in principle in favor of the freedom of commerce between nations, he subjected this general right to a series of limitations.

The most evident restriction to the free exchange of goods was the right of every country not to export what it deemed necessary to guarantee its subsistence. As we affirmed before, Vattel also mentioned this qualification to the right to trade. In addition, there was no legal obligation to export even luxury articles if that diminished the profits of the nation. Besides, no country could be forced to import the goods of another. This was precisely why Pufendorf disagreed with what he saw as Vitoria’s legitimization of the Spanish attempt to forcefully open American markets to their economic operations. This restriction to free exchange derived from the fact that free trade was not always the best economic option. Protectionism was necessary to prevent the wealth of a nation from passing to ‘the hands of foreigners’.

Christian Wolff also defended a right of states to trade, albeit subject to the same limitation to its scope of application: nations could not be forced to trade against their will. The outcome of commerce, Wolff noticed, was not always favorable; that is to say, trade could enhance the economic position of a nation as much as it could lead to its impoverishment. It all depended on the balance of payments between

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211 Pufendorf, *De Jure Naturae*, Bk III Ch III §11 369. In another revealing passage Pufendorf referred to the ‘liberty of trade, which is so strongly urged’. See Ibid., Bk IV Ch V §10 568.
212 Ibid.
213 Ibid.
214 Ibid., §12 370.
215 Ibid., 370.
217 Ibid., Ch I§67-68, 41.
the goods sold to and purchased from other nations.\textsuperscript{218} In consequence, and in order to protect their sovereignty, states established trade relations exclusively through their consent and by agreement.\textsuperscript{219}

In principle, the legal guarantees that Pufendorf (and Wolff) imposed on the right to trade when translated to a colonial context could help non-European polities protect themselves from European trade expansionism. In practice, this possibility was foreclosed by his endorsement of trade monopolies, in case a European nation made ‘some portion of Africa or India its own, after the fashion which the nations usually recognize as imparting dominion’.\textsuperscript{220} Accordingly, European nations could legally acquire parts of Africa or the Indian subcontinent, establishing a monopoly over the flows of commodities in those regions for their economic advantage. As he observed, that was an ‘everyday practice’ in accordance to ‘natural reason’.\textsuperscript{221} This right was part of a more general right whereby nations could establish trade monopolies by pact,\textsuperscript{222} and this was precisely what the VOC did in the East Indies.

Other references to colonies do not shed much light on the question of Pufendorf’s alleged anti-imperialism. He affirmed, for example, that ‘European nations with colonies in the East and West Indies may conclude a truce to be observed in Europe, and continue the war in the Indies’.\textsuperscript{223} In another passage, describing the creation of colonies, he added that ‘colonies may be and usually are planted in different ways’.\textsuperscript{224} One of the manners in which a colony could be established was by way of an ‘unequal treaty’.\textsuperscript{225} These statements were neither a critique nor an endorsement of Empire; Pufendorf was just describing a matter of fact. Of course, one could still argue that a lack of condemnation during on-going imperial domination amounts to an indirect acceptance of the status quo.

Free trade had quite positive connotations in the law of nations of the seventeenth and eighteenth centuries. There was a very tangible explanation for the appreciation of the increasing number of intercontinental networks of exchange on account of how much long-distance trade was contributing to the wealth of European nations and particularly to those individuals immersed in imperial ventures. Besides, trade was regarded as an instrument to further cosmopolitan values such as human

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\textsuperscript{218} Ibid. \\
\textsuperscript{219} Ibid. \\
\textsuperscript{220} Pufendorf, \textit{De Iure Naturae}, Bk IV Ch V §10, 568. \\
\textsuperscript{221} Ibid. \\
\textsuperscript{222} As an example Pufendorf mentioned the case of the VOC’s monopoly in Ceylon. See \textit{supra} footnote 204. \\
\textsuperscript{223} Pufendorf, \textit{De Iure Naturae}, Bk VIII Ch VII §3, 1318. In a similar type of passage dedicated to states’ change he also said that ‘… the custom followed by the Romans, and imitated by most of the present-day nations of Europe, was to found colonies that were to remain as part of the mother state, or of a greater fatherland’ ibid., Pufendorf, \textit{De Iure Naturae}, Bk VIII Ch XII §5, 1363. \\
\textsuperscript{224} Pufendorf, \textit{De Iure Naturae}, Bk VIII Ch XI §6 1356. \\
\textsuperscript{225} Ibid. \\
\end{flushright}
communication. But achieving fraternity, peace, or love through commerce outside European borders proved problematic as soon as it conflicted with the possibility of generous returns. Europeans did not hesitate to resort to violence when supposedly equal trading partners did not peaceably accept their commercial demands.

The economic activities of the VOC in the East Indies were a paramount example of this type of European trade imperialism through treaties. When the VOC encountered Asian polities that it could easily control, like in Southern India, the Malayan Peninsula, or Taiwan, it built fortifications and acted as de facto ruler. Acting as conquerors did not prevent the VOC from signing unequal treaties, which provided a semblance of legality, in which subjugated populations recognized its authority. Most of the East Indian rulers that submitted to the Dutch had already been vassals of other local sovereigns, so they accepted quite naturally the presence of a new powerful actor.

European commercial might and economic hegemony was not translated by legal scholars into a blind adherence to the legal institution of free trade. Indeed, many authors uttered critique against conceiving trade in absolute terms, so that any other consideration bent to it. They realized that the commercial edge of maritime empires, which allowed them to dictate the terms of trade, threatened to undermine the economic independence of other European nations. So, they were particularly careful to set clear limitations to the scope of the international right to free trade in a way that it would not compromise the sovereignty of European nations. Still they thought that it was not contrary to the law of nations that a country made commercial concessions to more powerful nations, and even that it granted monopolies over part of its trade.

The door then opened for charter companies to force Asian rulers to adopt a policy of commercial submission to the European companies, while letting them keep their nominal sovereignty. Trading restrictions that operated with full force within European borders faded away when applied to the wider world through the imposition of unequal treaties. In other words, the structural economic violence and overt physical force associated with the internationalization of free trade derived from the different

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226 Besides the Dutch, the Portuguese, the French (through the French East Indian Company), and the English (through the English East Indian Company) also exercised commercial and military power in the East Indies.
227 Richards, *The Unending Frontier*, 95.
228 Ibid., 102. On the conclusion of unequal treaties between European chartered companies and East Indian Rulers see C. H. Alexandrowicz, *An Introduction*.
229 Ibid., 37.
230 On this point see Ibid., 149-157.
standard applied to European and non-European polities, rather than from a strict adherence to the principle of free trade. Beyond European borders, protectionism was a fancy legal option.

The agricultural argument

The Dutch started their participation in the economic life of the Atlantic prior to having acquired independence from the Crown of Spain. Before revolting against Spanish rule in the late 1560s, they had already operated in the region as traders, sailors, soldiers, and missionaries within the Habsburg Empire. Once independence was secured, Dutch commercial activity in the Atlantic did not cease; on the contrary, it steadily increased. This notwithstanding, trade was shortly interrupted by the Twelve Years’ Truce signed with Spain in 1609, which prohibited Dutch merchants from operating in the Atlantic. But the expiration of the trust in 1621 and the creation of the Dutch West Indian Company (WIC) opened a new chapter in the history of Dutch involvement in the Atlantic, culminating with the addition of the Atlantic system to the profitable Dutch empire.

Without renouncing the model of fort-and-factory whereby they could affirm their power over weak East Indian polities without resorting to direct conquest, the Dutch become territorial in the two decades after the creation of the WIC. They founded the colonies of New Netherland in the center of the East coast of North America, New Holland in Brazil, and occupying several Caribbean islands. At about the same time they also started to annex some territory by force in the East Indies. The establishment of settlements entailed a departure from the imperialism of trade and garrison to the permanent occupation of territory. This change challenged Grotius’ theories in De iure praedae, which had been conceived to deal with a completely different set of circumstances.

In De iure praedae Grotius had argued that occupation created private property. During the Golden Age, humans had lived under a regime of common property. ‘God had given all things’ to be shared by ‘the human race’. Then, by a natural and ‘gradual process’, goods that satisfied basic needs like food and drink (following Grotius’ example) started to be privately possessed. In time, even

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232 Ibid., 171.
233 Ibid., 173-174.
234 Tuck, The Rights, 104.
235 Grotius, De iure Praedae, Ch XII 227.
236 Ibid., 228.
237 Ibid.
immovable things such as land were appropriated by individuals.\textsuperscript{238} Appropriation took place through occupation, ‘a physical act of attachment’ in Grotius’ words.\textsuperscript{239} Private property stemmed directly from that act.

After having explained the origin of private property, Grotius distinguished between two different meanings of the term \textit{res nullius}. On the one hand, this notion referred to things that by their nature were not suitable for private acquisition. On the other hand, it encompassed things which had not yet been privately appropriated.\textsuperscript{240} All things that had never been taken possession of could not be ‘the private property of any owner’.\textsuperscript{241} They were still \textit{res nullius}, and thus open to acquisition.

The sea was a typical example of things that were not susceptible to private ownership. The legal definition of the sea as common property served the VOC’s commercial ambitions in the East Indies. As an example of the second category of things that fell within Grotius’ understanding of \textit{res nullius}, he mentioned wild beasts, fish, and birds.\textsuperscript{242} These were exactly the kind of movable things covered by the law \textit{ferae bestiae} of the Roman \textit{ius gentium}.

The theory of occupation as Grotius recounted it in \textit{De Iure Praedae} was soon insufficient on account of the Dutch territorial ambitions in the Atlantic. Settlement in North America created a whole new range of legal problems. So, the theory of occupation in Grotius’ second major legal treatise \textit{De Iure Belli ac Pacis} can be read, at least to a certain extent, as a response to Dutch territorial expansion.

One of Grotius’ arguments in \textit{De iure belli} that could have been applied to give the United Provinces power over the peoples of North American was the right to fight ‘those who sin against nature’\textsuperscript{243} Tuck affirms that on this point Grotius concurred with Pope Innocent IV and, as he himself acknowledged, departed from Vitoria and the view of the School of Salamanca, favoring a right that was a clear apology for imperialism.\textsuperscript{244} Grotius went even further, equating those who ‘feed on human flesh’, the barbarians, with wild beasts.\textsuperscript{245} The assimilation of colonized populations in the Americas with animals was an infamous though familiar way of dehumanizing American peoples, common in the post-Reformation

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\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Ibid.
\item Ibid., 232.
\item Ibid., 230.
\item Ibid., 232.
\item Grotius, \textit{De Jure Belli}, Vol II Bk II Ch XX XL. §3 506. With the expression ‘offended against nature’ Grotius refers to American societies that practiced cannibalism and human sacrifices. Here Grotius cites Acosta’s \textit{De Procuranda Indorum Salute}, revealing the influence of Acosta’s writings on seventeenth century natural law.
\item Tuck, \textit{The Rights}, 103.
\item Grotius, \textit{De Jure Belli}, Vol II Bk II Ch XX XL. §3 505-506. Spanish colonial debates on the humanity/animality of American peoples resonate in Grotius’ association of the American societies that practiced ritual sacrifices with animals. For discussions on this topic during the conquest of America, see \textit{supra} Chapter 3, pages 110-118.
\end{enumerate}
\end{footnotesize}
treatment of the Other and the heterodox. The association of humans with animals justified the recourse to violence. As already mentioned, Grotius affirmed that ‘the most just war is against savage beasts, the next against men who are like beasts’.

Grotius complemented this legal entitlement to conquest with other arguments that widened Dutch power in North America, directly borrowed from or at least inspired by Vitoria. For instance, he defended the right of free passage of persons and goods in foreign lands, the right of temporary sojourn (which included building temporary accommodations on the seashore), and the right of exiles to settle in foreign lands. All these rights suited the cosmopolitan value of human communication, as they provided the legal basis for interaction between the world’s commonwealths. In all those cases, the presence of individuals from the United Provinces in North America was legitimate.

Although the rights of free passage, sojourn, and settlement of exiles legitimized the Dutch presence and commercial operations in the Atlantic, none of them directly justified the permanent occupation of territory. Similarly, the moral imperative of intervention in cases of crimes against nature was of limited value in North America where most of its peoples did not practice ritual sacrifices. Grotius overcame this difficulty by reference to the law ferae bestiae of the Roman ius gentium, that is, to the right of occupation over unoccupied movable things. For Vitoria, ‘natural partnership and communication’ included also the Spanish right to seize vacant movable things in America as recognized by ius gentium.

As above mention, Grotius himself used it in De iure praedae as part of his theory on the origin and acquisition of private property.

In De iure belli Grotius introduced an innovative approach to the law ferae bestiae, widening its scope of application so as to include both movables and immovables. As a result of this redefinition, vacant land became open to occupation. Grotius was not the first to defend that position; Sepúlveda had already argued in his Democrates Secundus that ius gentium gave a right over deserted lands to the first who occupied them.

247 See supra footnote 60.
249 Edward Keene, Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics (Cambridge, Cambridge University Press, 2002) 56.
250 See the discussion in Chapter 2, pages 92-98.
251 Sepúlveda, Tratado, 151. This was not the only difference between Grotius’ account of the origin and development of the right of private property in De iure Praedae and De iure Belli. In contrast with his earlier affirmation that occupation was the direct origin of private ownership, in the later work Grotius argued that the division of property took place by agreement, which was either direct (division) or tacit (occupation). See Grotius, De Jure Belli, Vol II Bk II Ch II II §3 189. The question of whether Vitoria included unoccupied land within the ambit of the law ferae bestiae is addressed in Chapter 1.
According to Garnsey, the fact that Roman law did not sanction the occupation of vacant land was probably related to the scarcity of free available land in the Italian peninsula and the more settled provinces of the Empire, where the concept of *terra nullius* must have almost been an empty category.\(^\text{252}\)

Therefore, the common view in Roman times was that every territory had a ruler who had the *potestas* to decide what happened within it.\(^\text{253}\) In contrast, there seemed to be plenty of land for first taking in America.

The inclusion of immovables in the category of unoccupied goods was not the only difference between Grotius’ account of the origin and development of the right of private property in *De iure praedae* and *De iure belli*. In contrast with his earlier affirmation that occupation was the direct origin of private ownership, in his later work Grotius argued that the division of property took place by agreement, which was either direct (division) or tacit (occupation).\(^\text{254}\) Historically, there had been an explicit agreement, the purpose of which was the division of communal property. Thereafter, it was implicitly agreed that all those things that had not yet been subject to private property could be seized by the first person who appropriated them.\(^\text{255}\)

What kinds of goods were still ownerless? Among such things Grotius mentioned ‘places hitherto uncultivated, islands in the sea, wild animals, fish and birds’.\(^\text{256}\) Importantly, for Grotius, uncultivated land could not only be found in unoccupied territory, but also in territories in which sovereignty was clearly exercised:

> Again, if within the territory of a people there is any deserted and unproductive soil, this also ought to be granted to foreigners if they ask for it. Or it is right for foreigners even to take possession of such ground, for the reason that uncultivated land ought not to be considered as occupied except in respect to sovereignty, which remains unimpaired in favor of the original people.\(^\text{257}\)

As with the Spanish scholastics, Grotius distinguished between the acquisition of two types of *dominium*: sovereignty (*dominium iurisdictionis*) and ownership (*dominium proprietatis*).\(^\text{258}\) However, he inverted the conclusions that Las Casas had made from that distinction concerning Spanish rights in America.

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\(^{252}\) Garnsey, *Thinking*, 121.


\(^{254}\) Grotius, *De Jure Belli*, Vol II Bk II Ch II II §3 189.

\(^{255}\) Ibid., Ch II III §3 191.

\(^{256}\) Ibid., Ch II IV. 192.

\(^{257}\) Ibid., Vol II Book II Ch II XVII. 202.

\(^{258}\) Keene, *Beyond the Anarchical Society*, 56.
While sovereignty remained exclusively in the hands of the inhabitants of a given territory, land ownership could be transferred to foreigners by effect of the agricultural argument. The distinction between imperium and dominium rerum allowed Grotius to respect the sovereignty of North American peoples while opening the possibility of appropriating part of the territories they inhabited. Even if in principle this right—having universal application—was informed by reciprocity, it was obvious that uncultivated land was more likely to be found in the depopulated and vast areas of North America than in the over-populated and tiny—in comparison—United Provinces, which were actually struggling to win land to the sea.

The link between agriculture and private property had an old pedigree in Western thought. The association of these two institutions with a period of moral decay after the Golden Age was already present in the work of classic Latin poets such as Virgil and Ovid. In contrast, natural rights theorists presented the introduction of agriculture in conjunction with private property in a more positive light as dictated by natural reason—God’s gift to humans. The Spanish scholastics had associated them both with the need for making the natural world productive through the application of human industry once it became corrupted as a consequence of the Fall. Although some canonists had already argued that the practice of agriculture created a right to seize vacant land, it was an axiom in Medieval thinking that no land could be acquired against the will of the local sovereign.

The trips of discovery of the early modern era changed that scenario dramatically. To European observers, the sheer immensity of America seemed to exceed the needs of the pre-colonial population of the continent. The supposed asymmetry between natural resources and population definitely tipped on the side of resources as a result of the population collapse that followed the arrival of European swords, germs, and systems of slavery and forced labor. In the seventeenth century the amount of land and natural resources that the survivors could manage considerably reduced. The logic of the agricultural argument perfectly fitted this new situation.

The first clear formulation of the agricultural argument appeared in Thomas Moore’s magnum opus Utopia, published in 1516. Referring to the fictional island of Utopia, situated in America, and to its inhabitants, Moore wrote:

260 Garnsey, Thinking, 122. Still these authors were not against private property, displaying an ambivalent attitude than went from mythological critique to realist adherence. Ibid., 110.
261 Tuck, The Rights, 49.
… if the population throughout the entire island exceeds the quota, they enroll citizens out of every city and plant a colony under their own laws on the mainland near them, wherever the natives have plenty of unoccupied and uncultivated land ... They think it is perfectly justifiable to make war on people who leave their land idle and waste yet forbid the use and possession of it to others who, by the law of nature, ought to be supported from it.263

In this passage Moore anticipated not only the idea but also the vocabulary adopted by later scholars that invoked the agricultural argument as a justification for colonial expansion.

It is worth emphasizing the economic logic behind the agricultural argument as Grotius formulated it. The imperative of productivity entailed looking at the globe’s landscapes with a new economic gaze. Every inch of the earth could and therefore ought to be made productive. European industriousness could be applied to vacant ecosystems in America for the betterment of humankind.

From an environmental perspective, the practical application—if partial—of Grotius’ doctrine of land acquisition to North America implied the legal predominance of Europeans’ more intensive way of relating to nature in the colonies, and the marginalization of the more sustainable—in comparison—environmental practices of the peoples of North America.264 For the colonialists, as for Grotius, exploiting the Earth was tantamount to owning it.

Grotius’ agricultural argument turned a blind eye to the North Americans’ ways of transforming nature other than cultivation. The colonists’ association of wilderness with what were in reality socially modified landscapes was the consequence of a lack of understanding of North American systems of land use.265 Several groups in North America selected trees and plants from which they obtained medicines and food. They also used fire selectively to open fields in order to attract wild game and assure hunting.266 Forests and meadows were largely the result of anthropogenic forces. All those managed landscapes fell within the legal category of vacant lands, extending the logic of economic efficiency even over natural spaces that were already—if differently—utilized and productive.

264 As we have already stated, sustainability was the result of a combination of factors. Lewis cites low population densities and a certain environmental management ethos derived from ‘cultural conscriptions arising from complex beliefs in reciprocal spiritual relationships’ as the most decisive factors for the preservation of ecosystems. See Lewis, ‘American Indian’, 191-213.
265 Cronon, Changes, 56.
266 Grotius, De Jure Belli, Vol II Book II Ch II XVII. 202-203.
A final environmental aspect of the acquisition of land and natural resources through the agricultural argument is that, as a result of the colonization of North America, the need for ecologically sustainable patterns of production, consumption, and population growth in the United Provinces was loosened. Demand and production could endlessly rise, even surpassing the threshold of what was ecologically viable considering the limited natural resources of the United Provinces, as the forests and lands of America could be used to obtain timber and cash crops that serviced the prosperity of the Empire.

The Dutch landed Empire in North America was short-lived. It disintegrated as swiftly as it was built. Despite keeping a considerable commercial weight in the Atlantic, Dutch colonies in Brazil and North America fell in the mid-seventeenth century due to the military superiority of competing colonial rivals. As in the East Indies, the English moved as well into North America. By the beginning of the seventeenth century, they had established two settlements in Virginia and New England. In order to validate colonization, they could invoke their own version of a right to occupy vacant lands as elaborated by the Italian Protestant jurist Alberico Gentili (1552-1608), who settled in England from 1580 and taught at Oxford, where he became Regius Professor of Civil Law. In fact, it was Gentili’s formulation of that right that inspired Grotius’ agricultural argument.

In Chapter XVII of the first volume of his major work De Jure Belli Libri Tres Gentili dealt with the question of offensive war. He inquired particularly on the right of exiles to migrate abroad and seize land. He noted that the establishment of colonies due to the forced migration of exiles was problematic when it led to conquest because it was not just ‘that the weaker and less distinguished should give place to the more powerful and more glorious’. A different standard applied when exiles settled in uninhabited places. In that case, occupation was ‘regarded as a law of nature’. As an example, Gentili referred to the first act of Pertinax, ‘who assigned all the uncultivated land of Italy and the rest of the world to those who would take possession of it and improve it’. This right was in consonance with Christian theology.

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267 A similar argument can be found in Keene, Beyond the Anarchical Society, 57.
268 Richards contends that: ‘The sugar colonies added millions of hectares of land to Europe's land area. The British, French, Dutch, Danish, and Spanish colonists and their compatriots at home obtained a windfall effect as they consumed the abundant natural resources of the Antilles and the Guianas.’ Richards, The Unending Frontier, 457.
272 Tuck, The Rights, 105.
274 Ibid., 81.
275 Ibid., 81.
As Gentili recognized, God had not created ‘the world to be empty’. America was one of the places where Gentili identified the existence of empty spaces apt for first taking.

Similar to the Spanish scholastics and Grotius, Gentili distinguished between imperium and dominium rerum. According to him, occupation of vacant land only gave rise to private property rights. The sovereign of the territories where exiles settled retained ‘jurisdiction over them’.

The early versions of the agricultural argument that appeared in the works of Gentili and Thomas Moore provided the architects of the English colonization of North America with a blueprint for agricultural development that was in tune with Christian doctrine. After all, the imperatives to fill the Earth and subdue it, the reasons that Gentili and Moore invoked, were God’s first commands to humankind. However, it was the reception of the theories of José the Acosta, rather than the influence of Gentili or Moore, that played an important role in shaping English theories of occupation, particularly in the colony of Virginia.

The Virginia Company’s promoters first used the writings of the Salamanca school to defend the status of civility and the right to property for North American peoples. Justification of the company’s economic activity in North America was strictly based on Vitoria’s right of communication through trade, which importantly included trading for land. And, as Vitoria had argued, the violation of that natural right gave a right to wage war.

Eventually a total reversal of this previous position took place between the defenders of English colonial venture in Virginia. The writings of José De Acosta were used by William Strachey (1572-1621), Secretary of the colony, and by the writer Samuel Purchas (1577?-1626) to argue that North American peoples belonged to the third category of barbarism according to Acosta’s scheme. Having neither notion of private property nor capacity to exploit nature, and almost fusing with nature, those barbarians were close to the condition of brutes and beasts. Concretely, for the purpose of the Virginia

276 Ibid.
277 It is worth noticing that Gentili argued that vacant lands could also be found in European commonwealths such as Greece, Turkey, and Italy. Ibid.
278 Ibid.
279 The point that the works of Acosta were more important than the writings of Gentili in shaping colonial debates in North America is made in Fitzmaurice, Sovereignty, 75.
280 Ibid., 59-70.
281 Ibid., 70-73.
282 Ibid., 70.
283 Ibid., 78-84.
284 Ibid.
colony the Algonquinian people of the Chesapeake were defined as being part of that low social
category.\textsuperscript{285}

In spite of the economic and political possibilities created by the legal development of the settlers’
entitlement to land, North American colonies did not immediately thrive. The creation of a ‘new society’
was an arduous process. Having ‘vacant’ land did not amount to the realization of any of the initial
expectations about American’s wealth, especially in the absence of precious metals. A new economic
vocabulary and suitable commercial mechanisms were needed in order to maximize the benefits of
exploiting the land and natural resources of North America so that the colonies could yield their expected
riches.

Capitalist developments in finance and commerce in the metropolis together with African slave labor
played a fundamental role in the eventual flourishing and consolidation of the British Atlantic system
and its colonies.\textsuperscript{286} Besides, the emergence of an early-modern English elite culture, in which land owners
and merchants interacted, enabled the application of certain principles of business management to the
improvement of agricultural land.\textsuperscript{287} These ideas about the practical improvement of landed states and
the possibilities for profits derived from greater production travelled with the English colonists to
settlement colonies worldwide, with important implications for world history.\textsuperscript{288}

From a theoretical standpoint, John Locke was a key figure in providing the conceptual vocabulary for
the transformation of the unhappy English American colonies of the beginning of the seventeenth century
into the vibrant, prosperous, productive enclaves they became at the turn of the eighteenth century. His
theoretical standpoints in the \textit{Two Treatises of Government} sponsored commercial agriculture in North
America and intercontinental trade between the colonies and the metropolis. In addition, his doctrine of
land occupation constituted a significant development of Grotius’ embryonic formulation of the

\textsuperscript{285} Ibid., 78.
\textsuperscript{286} Burnard, ‘The British Atlantic’, 119.
\textsuperscript{287} John C. Weaver, \textit{The Great Land Rush and the Making of the Modern World, 1639-1900} (Montreal & Kingston, McGill-
Queens University Press, 2003) 11. Weaver maintains that: ‘From the appetite for owning land evinced by aristocracy and
gentry sprang an urge, found among some people from all classes in British and American jurisdictions, to secure tract and
legal interests. With legal interests came credit and thus leverage for supposed improvements.’ Ibid., 12.
\textsuperscript{288} There were several other reasons that, according to Weaver, explains the land rush in British overseas settlements, namely
mobility and a lack of supervision, the cultural idea of progress, access to land ownership by people of modest means, political
stability, a strong culture of legality, and the security of property. Ibid., 11-13.
agricultural (or agriculturalist) argument. All in all, Locke is a key figure in the history of international thought.

Locke’s stake in the English colonial venture was even higher than Grotius’ interest in upholding Dutch expansionism. The latter was a mere employee for the VOC, while the former was secretary to the Lords Proprietor of Carolina and to the Council of Trade and Plantations, and later became a member of the Board of Trade. He was also an investor, holding shares for instance in the Royal African Company that traded in slaves. Locke wrote Two Treatises of Government in defense of the settlement in North America in the midst of a vivid debate in England about the economic profitability of investing in the colonies. The main argument against the whole colonial project was the possible negative impact it could have on English wealth and population growth. Locke rejected this claim, arguing precisely the contrary, that English presence in North America would stimulate the local industry. He accurately predicted that settlers’ demand for goods would create the need for English manufactures. Besides, the construction of ships and equipment to carry those goods across the Atlantic would generate additional economic possibilities.

Locke’s theory of property— influenced by Grotius— included original ideas. For example, Locke established labor as the main criterion to acquire property. In that, he departed from Grotius and Pufendorf who had affirmed that property was established through agreement. The inhabitants of America, he argued, had a right to the animals they hunted and the fruits they collected. The mere act of utilizing natural resources resulted in their privatization. The logic behind Locke’s conception of the origin of private property that runs like a thread through his second treatise of government was that

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290 This is the claim made in Armitage, Foundations, 74-89.
295 Locke was right, and the position he defended prevailed to England’s gain. See Nuala Zahedieh, The Capital and the Colonies: London and the Atlantic Economy, 1660-1700 (Cambridge, Cambridge University Press, 2010) 239-279. Moreover, for Zahedieh the North American colonies were a vital part of the Atlantic trading system, so much so that they shaped and simulated ‘the long period of slow structural change and economic development that culminated in the industrial revolution’. Ibid., 5.
297 Locke, Two Treatises, Bk II ChV §26, 305-306.
human industry improved nature, and that this increase in productivity gave rise to a more plentiful society.\textsuperscript{298} Society benefited from the more efficient exploitation of natural wealth that the process of privatizing natural resources entailed.

For Locke, labor was the decisive factor for land ownership. However, certain type of labor by which land was worked—selecting plant’s species, clearing forests to open land for wild animals, non-enclosed agriculture—did not count as appropriate ways of creating private property rights. In fact, according to Locke, land could only be owned when it was worked through enclosed agriculture.\textsuperscript{299}

The other side of improved land (using Locke’s own terminology\textsuperscript{300}) was wasteland; that is to say, land that had been neglected from the beneficial and transformative power of human industry.\textsuperscript{301} This particular understanding of unused land provided a wider scope of application for the agricultural argument than Grotius’ idea of vacant land. For Locke, even if Americans practiced agriculture, they could still lose their land, provided that this activity was not carried out in a proper manner, that is to say, in a way akin to English agriculture.\textsuperscript{302}

Another important aspect of Locke’s theory of occupation was his conclusion that the appropriation of wasteland by individuals was prior to the acquisition of \textit{dominium iurisdictionis}. No government could claim sovereignty over wasteland before its private acquisition and exploitation.\textsuperscript{303} Human liberty and property preceded civil society and could not be destroyed by it. In fact, the lack of personal and economic security was of utmost importance for the constitution of polities. As he put it, the ‘chief end’ of ‘Mens uniting into commonwealths and putting themselves under Government’ was ‘\textit{the preservation of their property}’.\textsuperscript{304}

Locke’s doctrine of material improvement through property rights, a vigorous defense of private economic power, provided the English colonists with the possibility of claiming jurisdiction over most of North America\textsuperscript{305}, which according to the vision of most English commentators and colonists was predominantly a wilderness.

\textsuperscript{299} Locke, \textit{Two Treatises}, Bk II ChV §32, 308.
\textsuperscript{300} Ibid., §33 309; §37 312; §42, 315.
\textsuperscript{301} Ibid., §38, 313; §42, 315; II, V, 42, 315.
\textsuperscript{302} Ibid., §38, 313.
\textsuperscript{303} Tuck, \textit{The Rights}, 176.
\textsuperscript{304} Locke, \textit{Two Treatises}, Bk II Ch IX §124, 368-369.
\textsuperscript{305} Ironically, as Fitzmaurice has showed, that claim was completely turned around by American colonists and used against the Crown’s entitlement over American land. They based their right to the land on precisely the Lockean notion that individuals could establish property rights prior to civil sovereignty. See Fitzmaurice, \textit{Sovereignty}, Chapter 6, 171-214.
The centrality of agrarian cultivation in Locke’s theory responded to the English colonial strategy in North America. The lack of precious minerals explains the ideological shift to cultivation. Most English commentators believed that agriculture was a more secure means of prosperity in the long run than gold or silver. If developed in a commercial fashion, cultivation was a mechanism that could allow their nation to surpass rival powers. In the same vein, they criticized mining and grazing, regarded by the Spanish and Portuguese as lucrative activities, for benefiting private interests rather than the nation at large and fomenting inter-colonial trade instead of trade between the colony and the metropolis. The financial difficulties of both Empires were vivid proof of the inappropriateness of their economic approach.

Was there any limit, according to Locke, to the amount of land that could be appropriated in North America? He found two such limits. One was the obligation of leaving as much property free as was possessed. The other, which rested on the prevention of spoilage, limited the acquisition of property to what could be properly cultivated. These limits did not stem from egalitarian concerns. They were based on economic calculations, reflecting the widespread opinion among English colonial administrators that when too much land was appropriated for plantations the returns diminished. Locke was able to reconcile the restriction of land appropriation with the possibility of capital accumulation by bringing into play the concept of money. He believed that ‘as different degrees of Industry were apt to give Men Possessions in different Proportions, so this Invention of Money gave them the opportunity to continue and enlarge them’. It was relatively easy then to distinguish between North Americans’ subsistence agriculture, which did not require money, and English plantations, which could encompass sizeable tracts of land thanks to the monetary exchange of surplus. It was clear which of the two systems Locke valued the most. As he recognized, ‘Trade, then, is necessary to the producing of riches, and money necessary to the carrying on of trade’. The seemingly egalitarian limits of land appropriation that Locke had introduced faded away once money was brought into play. He was sure

307 Ibid., 64.
308 Locke, Two Treatises, Bk II CH V §34-36 309-310 and Ibid., § 37, 312.
309 Ibid., §31, 308.
311 Locke, Two Treatises, Bk II Ch V §48 319. The first reference to the invention of money appears in Ibid., §36, 311.
‘that Men have agreed to disproportionate and unequal Possession of the Earth’.  

Fortunately for his own interest, he was on the winning side.

Similar to Grotius, Locke’s theory of property implied that the legal prerequisite for land ownership was the thorough exploitation of nature. His own words are illustrative: ‘And hence subduing or cultivating the Earth and having Dominion, we see are joined together.’

Long after Locke, in the mid-eighteenth century and in the context of an emerging system of states, Vattel deliberated on the importance of agriculture as a mean to enhance nations’ wealth and happiness. Despite the time span between both authors, some of Vattel’s ideas resembled those of John Locke. As with the latter, the former associated cultivation with private property, profits, and trade. According to Vattel, ‘The cultivation of the soil’ is ‘the most solid fund of riches and commerce’. The goal of agriculture was the improvement of the Earth’s fecundity through human effort. In consequence, Vattel concluded that within a nation common land did not allow to ‘enclose and cultivate it in the most advantageous manner’. This conclusion was extendable to the whole world: the Earth did not receive ‘proper cultivation from wandering tribes of men continuing to possess it in common’. In order to become fruitful the world’s resources had to be privatized and placed in the hands of the industrious.

Notwithstanding similarities, there were also important divergences between the theories of Locke and Vattel. Whereas the former was mainly concerned with the relation between individuals and the state and, particularly, with the right of the former to possessions prior to the formation of a political community, the focal point of Vattel’s exposition of the law of nations was the relations between nations. So, Vattel derived both *dominium* and *imperium* from the fact that a nation took possession of a country. Jurisdiction and ownership emerged simultaneously. Hence, colonialism proceeded under the premise that once new land was occupied it was automatically incorporated into metropolitan territory. In the words of Vattel: ‘When a Nation takes possession of a distant country and settles a colony there, that country, though separated from the principal establishment, or mother-country, naturally becomes a part of the State, equally with its ancient possessions.’

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313 Ibid., §50, 320.
314 Ibid., §35, 310.
316 Ibid., §78, 34.
317 Ibid., Book I Ch XVIII §203, 97.
318 Ibid., Bk I Ch XVIII §205, 98.
319 Ibid., §210, 100.
For Vattel it was nations rather than individuals that were not only allowed, but actually ‘obliged by the law of nature to cultivate the land that has fallen to its share’.\footnote{Ibid., §81, 34.} This obligation provided a criterion to judge the use of natural resources. Through this prism, the impetus to transform the globe and render it more productive could be invoked against all ‘others, who in order to avoid labor, seek to live upon their flocks and the fruits of the chase’.\footnote{Ibid., §81, 38.} Accordingly, those ‘others’ ‘may not complain if other more industrious Nations, too confined at home, should come and occupy part of their lands’.\footnote{Ibid.}

Unquestionably, the world belonged to industrious, hardworking nations.

The point of departure for this conclusion was the application of the law ferae bestiae to both moveables and immovables. Vattel highlighted the fact that ‘all mankind have an equal right to things that have not yet fallen into the possession of any one; and those things belong to the person who first takes possession of them’.\footnote{Ibid., Bk I Ch XVIII §207, 98.} That rule allowed nations (not individuals) to take possession of uninhabited lands.\footnote{Ibid.}

Vattel’s use of the agricultural argument became more explicit when he enquired whether a nation’s right of occupation of an uninhabited country was applicable to North America, which was undoubtedly inhabited but not fully used. He answered this question affirmatively, asserting that North American ‘erratic nations’ could not take for themselves more land than they needed or were ‘able to settle and cultivate’.\footnote{Ibid., §209, 99-100.} They only had ‘legal possession’ \textit{(dominium rerum} and \textit{dominium iurisdictionis)} over those regions of North America where their ecological footprint was manifest. Having found ‘land of which the savages stood in no particular need, and of which they made no actual and constant use’, the Europeans ‘were lawfully entitled to take possession of it, and settle it with colonies’.\footnote{Ibid., §209, 100.}

The question of the ecological footprint of North Americans in comparison to Europeans was of foremost importance. In Vattel’s version of the agricultural argument the use of a particular natural habitat had to be ‘constant’. This meant that if a North American nation relocated, providing nature time to regenerate, they automatically lost the rights over the lands from which they had moved. Only the European’s more intensive approach of permanent utilization of particular landscapes assured full legal rights of possession.
Vattel’s formulation of the agricultural argument legitimized the practices of colonizing powers eager to extend their sphere of control over North American natural resources. This notwithstanding, Vattel still praised the fact that many colonists had purchased land directly from North American peoples. As he noticed, New England settlers did this even though they had ‘a charter’ issued by ‘their sovereign’. But nothing in his words indicated that buying land was a necessary condition to acquire private property. It was just ‘a laudable example’; nothing less, nothing more. Even without that type of transaction, and following the dictates of nature, it was just to confine ‘the Indians within narrower limits’ than they were used to living in.

The association of agriculture, efficiency, and profits by Grotius, Locke, and Vattel with the wellbeing and happiness of individuals and nations and the formulation of that association as a standard of land appropriation in overseas territories became a legal tool in the hands of individuals, companies, and states to further the ends of empire. In contrast to these authors, it has been argued that Pufendorf and Wolff stand as anti-imperialist figures whose scholarship provided protection to the territorial rights of non-Europeans against European encroachment. As in the case of commerce, this description is not entirely accurate.

For Pufendorf, ‘individual dominions’ (private property) originated ‘from division and occupation’. First humans made a pact whereby the primitive community of things was divided. But that division did not comprise all the goods of the world. So, it was agreed that thereafter the law *ferae bestiae* applied. In other words, each person became the owner of the vacant things that he had appropriated through a bodily act of seizure: occupation. In the same manner as Grotius and Locke, Pufendorf expanded the law *ferae bestiae* to encompass unoccupied immovable goods, especially land. Again, similarly to these authors he concluded that land could be occupied by individuals through cultivation and enclosure.

A second kind of land occupation involved the seizure of land by a group. In the case of a group occupying a territory, vacant land was not open for first taking because it already belonged to the whole

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327 In fact, English purchase of land from North Americans became the rule of land acquisition in the Northern part of the continent. However, the agricultural argument had been widely used in the first stages of British settlement in North America. See discussion below in pages 209-214.
328 Ibid.
329 Ibid.
330 Ibid.
331 See supra footnotes 206 and 207.
332 Pufendorf, *De iure Naturae*, Bk IV Ch IV §10, 547.
333 Ibid., Bk IV Ch VI §2 569.
334 Ibid.
335 Ibid., §3 570 and §8 577. Similar remarks can be found in Bk IV Ch IV §6 540.
people. Sovereignty marked the limits for the acquisition of property. But in the case of ‘desert places’ the ‘supreme powers of the state’ could limit occupation only with regard to the members of the group. In other words, foreigners were free to occupy vacant regions and make ‘them their own’. Then Pufendorf illustrated his statement by citing the words of Selden about the customs of the Jews: ‘Anything found in desert places or not owned or cultivated by private persons, or in rivers and torrents, belonged to the person who occupied it …’

Importantly, in citing Selden Pufendorf included uncultivated lands in the category of vacant places. This reference would fit Pufendorf’s belief that the Earth could not feed an increasing population unless it was ‘cultivated and improved’. Pufendorf never explicitly referred to North America as an example of a place where vacant land could be found and acquired. But if it was demonstrated that agriculture was not practiced there, then the acquisition of land in North America would not be contrary to the doctrine he put forward.

Pufendorf distinction between sovereignty (dominium iurisdictionis) and private property (dominium rerum) also seems to indicate that vacant land could be occupied. For him, sovereignty over unoccupied places derived from the acquisition of private property, and not the other way around. Only when private property had been established in a desert place was sovereignty created. Pufendorf affirmed that ‘sovereignty is improperly spoken of as existing over a place or territory, the effect of which is that no one can take that place for himself without the consent of him who is said to hold sovereignty over it … Yet this sovereignty is properly the effect of dominion that has been established over that place, and includes some sovereignty over men only as a consequence.’ Therefore, the occupation of unoccupied lands created private property rights first, and then sovereignty.

Wolff made explicit the ideological association between agriculture, the improvement of nature, and prosperity that underpinned the international legal theories of the era. For him:

If desert and uncultivated places are transformed by cultivation from sterile or at least useless places into fertile and useful places, since in this manner industrial products are multiplied and a crop of natural products is developed by industry and exertion, which assuredly tends to the perfecting of the condition of the nation.
This did not mean, however, that uncultivated land within the territory of a nation could be freely occupied.\textsuperscript{343} On the contrary, it belonged to the nation at large, and even if its ownership was transferred, sovereignty remained the exclusive prerogative of either the nation or its ruler. But a different criterion applied to the land not yet subject to ownership and sovereignty, in which colonies could be legally established.\textsuperscript{344}

Was this standard applicable to North American territories? Unlike Pufendorf, Wolff discussed in detail the acquisition of North America’s original territories. It is worth acknowledging that, contrary to the doctrines of Vattel or Locke, his arguments offered legal protection to North American peoples. He held that separate families owned the territory in which they lived and wandered.\textsuperscript{345} Even lands not yet in use within their territory at a given time could not be acquired as long as their intention was to eventually utilize them.\textsuperscript{346} Furthermore, cultivation was not the only activity that legitimized ownership of ‘uncultivated wilds’.\textsuperscript{347} North Americans’ use of the land for grazing cattle and ‘other purpose’ (Wolff seems here to be referring to hunting) made it their own. Despite this high threshold of protection, Wolff still maintained that:

Since separate families dwelling together in a certain territory own the lands which they have occupied, but the other places are the property of nobody; if in a district in which separate families hold their own land there are still other lands the use of which can be private or individual, those lands can be occupied by anybody.\textsuperscript{348}

The key to understanding the limitations of Pufendorf’s and Wolff’s cosmopolitanism is the concept of the sovereign nation. Within nations/states, no acquisition of uncultivated or uninhabited territory was possible. This guarantee helped preserve their independence and equality, undoubtedly, a high accomplishment for the international thinking of the time. It also provided an important legal guarantee to the Swedish Crown and the Prussian state (to which they gave their services), wary of the risk that the imperialist ambitions of certain European neighbors represented to their own independence and sovereignty. In addition, the fundamental distinction nation/no-nation, that correlated to the opposite

\textsuperscript{343} Ibid., §276 141.
\textsuperscript{344} Ibid., §291 147-148.
\textsuperscript{345} Ibid., §310-312 157-159.
\textsuperscript{346} Ibid., §310 158.
\textsuperscript{347} Ibid.
\textsuperscript{348} Ibid., §311 159. Vattel argued along the same lines. See Vattel, \textit{The Law of Nations}, Bk II Ch VII §97 143.
European/non-European polity, left open the door for the colonial projects of the states that employed them.349

Unlike European territories, some non-European territories did not pass the test of nationhood and, hence, could not enjoy the same degree of protection afforded to nations. Thus, when referring to the property of separate families Wolff noted that no injury was made when land was acquired in those territories, as no nation existed.350 Without a nation there was no civil sovereignty, and without sovereignty no secure ownership of uninhabited lands. Wolff’s words are illustrative: ‘All the earth is open to everybody as long as sovereignty over it has been assumed by no one, and everyone who needs them can occupy things in it which have no owner.’ 351 Pufendorf never explicitly formulated a distinction of nation/no-nation applied to non-European territory, but the more protective treatment given to European state’s territory vis-à-vis non-European territories is an indication of a conceptual differentiation between both spheres.

A final important point about the internationalization of free trade and plantation agriculture through the law of nations during the seventeenth and eighteenth centuries is that these activities, which contributed to aggrandize imperial power in non-European territories, seemed in principle rid of the kind of religious bias that pervaded the legal arguments of Spanish scholars. International trade was based on the consent of East Indian polities. Similarly, the agricultural argument was based on a free-value judgment of the condition of North American natural habitats. Any observer could have objectively verified the virgin state of the land and natural resources.

The apparent neutrality of international trade and the objectivity of the agricultural argument, despite their European pedigree and their service to European economic and territorial expansion, protected them from the kind of contestation that Spanish religious justifications for colonialism had faced in other

349 In fact, Pufendorf’s and Wolff’s ambiguity reflected the ambivalent position of Sweden and Prussia in the concert of European nations. They were simultaneously fearful of the imperial ambitions of European neighbours and aware of the economic importance of holding colonies. The Swedish Crown had established the colony of New Sweden in America (in present-day Delaware) and the colony of the Gold Coast in the Gulf of Guinea in West Africa (in present-day Ghana and Togo) in the mid-seventeenth century. The last colony fell to the alliance of Danish and Dutch power in 1663, only 9 years before the publication of Pufendorf’s magnum opus *De Iure Naturae et Gentium*. The Kingdom of Prussia had inherited from the Brandenburg-Prussian era the Branderburger Gold Coast, a colony on the Gulf of Guinea that lasted until 1717; Arguin, an island off the western cost of Muritania, which was lost in 1721; and had repeatedly but unsuccessfully tried to establish a permanent presence in the Caribbean. Finally, the only way of getting a provisioning base in the Caribbean was by renting part of the island of St Thomas, which they definitively abandoned in 1735. See Tuck, *The Rights*, 143-144.

350 Wolff argued that ‘separate families dwelling in the same land are to be distinguished from nations, nor can those things be applied to them which we have proved concerning the rights and duties of nations’. See Wolff, *Jus Gentium*, §309 157. The same reasoning can be found in Ibid., §311 159.

351 Ibid.
European nations. Plantations and markets represented an efficient way of generating and increasing the productivity of vacant or under-utilized natural resources. In the context of an incipient and small-scale but extremely profitable global network of exchange, how could moral scruples compromise European attempts to improve the way that the natural resources of the world were used? In theory, the intention behind the economic expansionism of European seaborne empires was merely to establish peaceful commercial relations and seize vacant land and natural resources in foreign territories in order to foster worldwide efficiency and prosperity, fulfilling God’s mandate to master the Earth. Reality proved otherwise.

**Christianity, wilderness, and the exploitation of North American ecosystems**

The agricultural argument and the logic of efficient use of natural resources found their way into the major treatises of the law of nations in the seventeenth and eighteenth centuries. For European empires, the application of a legal standard of land occupation backed by the idea of improving nature was a convenient way of extending their territorial sway into non-European territories, America in particular. Moreover, it provided vital access to agricultural commodities in high demand in expanding globalized markets. Alongside its legitimating value for the metropolis, the agricultural argument also had a direct influence on colonial debates in the English settlements of North America, playing an important role in how the American physical environment was perceived, defined, and used.

Christian ideas and conceptions about nature set the ground for the fertile application of the agricultural argument in North America. In fact, Colonization went hand in hand with a slow but thorough change of approach toward the North American environment, whereby a generally sustainable use of natural resources by North American peoples shifted toward their increasing private appropriation and exploitation. As Shepard Krech, a critic of the concept of the ‘ecological Indian’\(^{352}\) has put it: ‘whatever the impact of Indians on land and resources, it didn’t hold a candle to the long-term impact of people of European descent.’\(^{353}\) Population growth played a large role in this dynamic. But these important changes on the environment were also the result of the influence of the different conceptions of North Americans and Europeans in regard to nature.\(^{354}\) As Burton has noted:

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\(^{352}\) See *supra* Chapter 1, pages 22-23.
\(^{354}\) Steve Ncholls, *Paradise Found*, 450. See also Deloria Jr., *God is Red*
Of everything the first European immigrants brought to North America, perhaps the most enduring effect on the environment and its indigenous peoples would not be the colonists’ tools and technologies, dress, or disease, but rather, their ideas and beliefs. For these were the ways they conceptually constructed their “New World”: how they determined what was right and wrong behavior, how they were moved to use the environment to meet their needs and desires, and how they sought to order their relations among themselves and with their indigenous neighbors.355

The ideology that most prominently shaped the colonists’ conceptualization of the North American environment was Christianity. The first North American colonies were founded by Protestant radicals that had escaped European religious wars and economic crisis.356 Despite variations between settlements, a shared Christian faith united them under a common umbrella.357 From their Christian perspective the land they had come to occupy and work was generally perceived as a wilderness.358

The idea of wilderness had an old pedigree in Christian thought. The word is mentioned in the Bible approximately a hundred times.359 In the Holy Scriptures wilderness or desert place designates a territory that is not inhabited and it is usually uncultivated.360 Key passages of the Bible refer to the need to confront the wild and dark forces of the outside world as well as the inside world of temptation in order to achieve redemption. An example of this confrontation was the Jewish nation, which fled slavery in Egypt under the leadership of Moses and wandered in trial and penitence in the wilderness of the Sinai Peninsula for forty years before arriving to the promised land of Canaan.361 In the New Testament the stories of John the Baptist and Jesus are linked by the idea of wilderness. John the Baptist was a crying voice in the wilderness that called for repentance and baptism.362 One of those who came to him was

357 Ibid., 17.
359 Alexander Cruden, *Cruden’s Complete Concordance to the Old and New Testaments: with notes and biblical proper names under one alphabetical arrangement*, edited by C.H. Irwin, A.D. Adams, S.A. Waters (London, Lutterworth, 1955) 748-749. This number contrasts with the little attention devoted to words such as nature (meaning the natural world) which is mentioned three times, Ibid., 452; creation which appears 6 times, Ibid., 116 and even garden (wilderness’ opposite) referred to 40 times, Ibid., 242.
360 Ibid., 748.
361 This is the story recounted in the books of Exodus, Leviticus, Numbers, and Deuteronomy. See *The Revised English Bible: with the Apocrypha* (Oxford, Oxford University Press, 1989) 45-181. In the book of Exodus and Numbers there are two sections entitled ‘In the wilderness’ and Israel in the ‘Wilderness of Sinai’, respectively. See Ibid., Exodus 15 58 and Numbers 109.
362 Ibid., Matthew 3 2; Mark 1 30 and Luke 3 51-52.

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Jesus, who immediately after being baptized immersed himself in the wilderness of the desert, where he was tempted by the Devil and guided by the Spirit.\textsuperscript{363}

For the Puritans who travelled to New England, wilderness was a place of refuge and terror, crucifixion and resurrection.\textsuperscript{364} It was the interface between the world of sinfulness in which they lived and the New Canaan to which they aspired. Wilderness was a composite. It had an external dimension denoting a barren physical place, and an inner psychological dimension indicating a location in the mind with chaotic and evil tendencies. The combination of both states created a powerful religious perception of the natural world alongside a desire to transform it.\textsuperscript{365}

William Bradford, the founder of the Plymouth colony and its governor for over 30 years, described the harbor of Cape Cod where the Mayflower anchored in 1621 as a ‘hideous and desolate wilderness, full of wild beasts and wild men’.\textsuperscript{366} In fact, ‘the whole country, full of woods and thickets, represented a wild and savage hue’.\textsuperscript{367} John Winthrop, a wealthy English puritan lawyer, one of the founding figures of the Massachusetts Bay Colony and governor of the same for twelve years, concurred with Bradford when he referred to North America as a ‘wilderness where are nothing but wild beasts and beastlike men’.\textsuperscript{368}

Still, the Christian idea of wilderness and its implications in North America was not monolithic. Among New England Calvinists, the Arminians and the Antinomians held different conceptions.\textsuperscript{369} The former conceived the territory of New England as a wilderness that had to be tamed. By contrast, the latter saw it as a garden surrounded by wild nature.\textsuperscript{370} But they both agreed that their new territory was sacred or sacred-to-be.\textsuperscript{371} Differences between both groups disappeared with the second generation of New Englanders as New England’s prosperity definitively proved to the heirs of the pioneers that their home

\textsuperscript{363} Ibid., Matthew 4 2; Mark 1 30 and Luke 4 52.
\textsuperscript{365} Nash contends that ‘the Old Testament was even more important than New England actuality in determining reaction to the wilderness’. See Nash, \textit{Wilderness}, 39.
\textsuperscript{367} Ibid.
\textsuperscript{369} For a detailed analysis of these two groups see Williams, \textit{Wilderness Lost}, 46-80.
\textsuperscript{370} Ibid., 53.
in North America was (as it had always been for the Antinomians, or in opposition to its original state for the Arminians) the Promised Land.372

The religious mission of American colonists consisted to a great extent on taming the wild North American environment.373 Their desire to control and master nature was also a consequence of their pressing need to survive in an alien environment. Moreover, American colonists were well aware of the threat of human degeneration that a wild environment posed to them.374 Either they domesticated the land or the land would transform them and turn them into the savages that the first colonists found at their arrival. They thus constantly felt the menacing presence of the vast forest and wild animals that inhabited them. Paradoxically, the forest and its shadow grew larger as North American peoples, who had kept it in check through periodic burnings, started to die in large numbers as a consequence of the first wars of conquest and the diseases carried by the colonists.375

The first colonists instituted a thorough program of environmental transformation in North America. Finding thick and dense forests in the continent, they cut timber in order to open space for agriculture and obtain construction materials. They tilled the land, establishing individual farms but also countless plantations.376 But from what religious sources did they derive the power to carve a civil society out of North American wilderness? Did God allow them to exploit the environment for their benefit?

For the Protestant colonists, Genesis was the most important source of knowledge when it came to answering these questions. The passages in which God laid out his program for humans and nature were of particular importance. After having created all life, God said: ‘Let us make human beings in our image, after our likeness, to have dominion over the fish in the sea, the birds in the air, the cattle, all wild animals on land, and everything that creeps on the earth.’377 Then he gave humans a specific command: ‘Be fruitful and increase, fill the Earth and subdue it.’378

New England Calvinists knew well these passages from the Scriptures.379 Several regulations and statutes that allocated land for settlers in New England included references to them. Concretely, passages

372 Williams, Wilderness Lost, 80.
373 Gatta affirms that: ‘firs generation puritans tried indeed to armour themselves against the wilderness, to wall out the untamed and ostensible ungodly forces that surrounded them.’ See John Gatta, Making Nature Sacred: Literature, Religion, and Environment in America from the Puritans to the Present (Oxford, Oxford University Press, 2004) 17.
375 Ibid., 25.
376 See supra Chapter 1, page 38-39.
377 The Revised English Bible, Genesis 1:26, 1.
378 Ibid., 1:28, 1.
379 Nash, Wilderness, 31.
of Genesis and Psalms were cited, stressing that God had given the Earth to humankind in order for them to replenish it. Enshrined in the new colonial rules, the sacred mandate to subdue nature was integrated as part of the legal entitlement to acquire land and settle North American territory. The agricultural argument was particularly suitable to this ideological background.

The impact of Christianity on the North American environment was not reduced to the role of religious ideas. Evangelization encouraged the exploitation of the natural world. The Church’s objective of extending its spiritual and earthly power over the populations of the Western hemisphere coincided with the settlers’ interest in expanding the natural frontier. Penetration into the continent in search for new natural resources offered the Church the prospect of adding new souls to its mass of followers, as well as increasing its wealth and possessions, in a religious context in which Catholics and Protestants competed to win converts to their religious cause.

*The agricultural argument in North America*

On their arrival to North America, the English proclaimed that their Crown was sovereign of the newly acquired territories as it had, by discovery, a better legal title than any other European colonial power. So it was a question of the property over the land rather than its sovereignty that was hotly disputed at the time of the establishment of the first settlements. During the beginning of the seventeenth century, arguments in favor and against North Americans’ ownership were equally strong.

The dispute was particularly prominent in the colony of Virginia, where the reception of the writings of the School of Salamanca helped shape the view that North Americans were true owners of their territories. In this first period of settlement, many among both critics and defenders of English colonialism highly regarded North American societies. The general understanding was that North American peoples lived in civil societies and were able to use their natural surroundings efficiently.

However, this positive understanding of North American peoples soon turned upside down. The reception of the writings of José de Acosta served to argue that the Algonquian peoples of the Chesapeake

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383 Ibid., 65-66.
were not owners of their territories. Redefining Virginian ecosystems as vacant created the possibility of full application of the right to occupy unoccupied natural resources.

Despite the wide use of Acosta’s writings in Virginia, even the most fervent adherents to Acosta’s debased consideration of North American peoples oscillated between the ambiguous positions of justifying their lack of private property and defending the purchase of their land. As time passed, the opinion that North Americans were the true owners of the land they possessed—as Wolff would later defend—prevailed. So, in general, the English settlers acquired land from the original inhabitants of North America by purchase rather than force. In fact, many land speculators even supported—albeit with little success—North Americans’ claims of sovereignty and, hence, their capacity to cede land directly without having to obtain the permission of the Crown, a possibility that if materialized would have played to their economic advantage.

Once there was a general agreement about the issue of North Americans’ land ownership, the disputed topic was the extension of that property. Did they own merely what they cultivated, or were they also the proprietors of the vast continental territories where they fished, hunted, and collected plants and fruits? The answer to this question was of utmost economic importance because it related to the amount of land available for English appropriation without payment. The recognition of North American peoples’ ownership over non-agricultural land would have meant that their possessions could encompass virtually the entire continent.

One possible solution to this conundrum was the application of a standard of ownership based on the agricultural argument. Accordingly, at the arrival of the English, North American peoples could only own as much land as they were cultivating. As a commentator of the period put it, ‘where they have subdued, replenished & are actually improving, that is their Property’, but ‘the Natives or Indians should’

384 See supra discussion at page 195.
385 Fitzmaurice, Sovereignty, 82-84.
386 Banner, How the Indians Lost Their Lands, 10-48.
387 Ibid. The fact that negotiations about property took place did not amount to equality between the actors involved in land transactions. As Weaver reminds us: ‘The technology of law that colonizers introduced through sovereignty over frontiers excluded the habitat and social practices of first peoples, although those peoples had resolved conflicts and determined relations with respect to territory prior to contacts with Europeans. A one-way flow of concepts meant that when first peoples were approached about ceding property rights, even by scrupulous, sympathetic, and linguistically adept colonial agents, the parties bargained across a cultural abyss. Legal arguments benefit from nuance, and that made matters one-sided enough.’ That does not mean that North American peoples were mere innocent victims: ‘Cunning white agents and first people alike practiced deceptions; however, illegitimate tactics served colonizers far, far better, because the technology for acquisition arose solely from their history.’ See Weaver, The Great Land Rush, 140-141.
388 Ibid., 137-138.
389 Ibid.
390 Banner, How the Indians Lost Their Lands, 33.
not ‘be invested with the Property of all this vast unsubdued, unreplenished, unimproved, unknown, and greatest part of this Creation’. The improvement of the Earth through human labor became the lynchpin of the English colonial edifice. The non-legal rationale that informed the agricultural argument gave concrete flesh to it and influenced the formulation of property laws and the acquisition of land in North America.

In contrast, and despite the environmental footprints that resulted from North American peoples’ sustained utilization of their natural habitats, uncultivated territory was persistently perceived by English priests, travelers, colonial administrators, and legal and political authors as a wilderness, and described in pejorative terms as empty, spacious, void, deserted, and waste. There was a psychological aspect to this negative representation of the environment. English settlers, who venerated the land they had reclaimed, feared untamed nature. This was related to their fear of ‘savage’ contamination from North American peoples who had allegedly degenerated due to the wild influence of their natural habitats. There was then ample scope and a strong stimulus for the application of English industriousness to the improvement of the North American wilderness at the expense of North American peoples and polities. The occupation of vacant land was thus used in the seventeenth century to legitimize legal claims to the territories of North American peoples.

The reception of the work of José de Acosta in the colony of Virginia, for example, gave theoretical ammunition to those who conceived North American societies as backward, and facilitated their assimilation to the North American environment. The Algonquin peoples of the Chesapeake, for instance, were placed in Acosta’s third category of barbarism and deprived of their natural resources and

391 Joseph Morgan, The Original Rights of Mankind Freely to Subdue and Improve the Earth (Boston, Printed for the author, 1722) 6.
392 For the importance of the idea of improvement in the English Enlightenment see Roy Porter, ‘The Environment and the Enlightenment: The English Experience’ in Lorraine Daston and Gianna Pomata (eds.), The Faces of Nature in Enlightenment Europe (Berlin, BWV, 2003) 17-38, 24. For Elliott, ‘in speaking the language of improvement, British settlers ... were in effect using as a justification for their occupation of American Indian territory a term expressive of the accumulative and developmental approach to resources that was steadily gaining ground in pre-industrial England.’ Elliott, Spain, Europe & The Wider World, 121. Weaver describes the improvement of land as the application of ‘labor and capital, so as to boost the lands’ carrying capacity and hence its market value’. See Weaver, The Great Land Rush, 81.
393 Weaver, The Great Land Rush, 12 and 134.
396 Canup, Out of Wilderness, 5.
397 Fitzmaurice, Sovereignty, 172.
398 Fitzmaurice, Sovereignty, 73-79.
land on the grounds that their savage mores and simple productive activities proved that they could not have possessions.399

As several colonial texts of the period reveal, the agricultural argument was an important instrument for the English appropriation of land previously owned by North Americans, especially during the beginning of the seventeenth century.400 In New England, for example, this was the case with the introduction of enclosed agriculture, alien to North American agricultural systems.401 The institution of private ownership had an important effect on how New England’s colonists perceived nature, as landscapes were mainly perceived as commodities.402 In Virginia, settlers also fenced off large tracts of land, seizing territories that erroneously seemed to them as not in use.403

But enclosed farms constituted just part of the tenure practices whereby Europeans appropriated land in North America. Of great relevance was also colonists’ common property: both ‘inner commons’ or common areas located in the tillage zone of a given community, and ‘outer commons’ or natural resources that were commonly owned in the area beyond local croplands.404 There was a clash of ‘indigenous commons’ with ‘colonial commons’ throughout all American territory, including Spanish, English, and French areas. In fact, private and common property generally acted as complementary ways of managing natural resources and land in colonial North America.405

In time, as the English got the upper hand in North America, colonial officials gradually tended to recognize North Americans as true owners of the places they inhabited and used, even if they were not cultivated.406 Change of official policy contrasted with the attitude of colonists, and some colonial administrators—under the impetus of a growing population avid of land—did not hesitate to occupy uncultivated territories or grant them to settlers.407 Furthermore, even when purchase became the rule,
the agricultural argument indirectly influenced land acquisition. This was so because environmental degradation had negatively affected North Americans habitats. In the early stages of colonization colonial wars and the agricultural argument helped in transferring plenty of natural resources from North American to English hands. The accelerated depletion of those natural resources during those first stages of English settlement made the land less useful to North Americans, who eventually became more inclined to sell territories which no longer satisfied their food requirements. This notwithstanding, it is still worth bearing in mind that the appropriation of territory was not always a non-violent act.

The agricultural argument, which rested on a particular European conception of humans’ relation with nature, property, and land, was a deficient intellectual tool for understanding the way in which North American peoples related to their natural habitats. Concretely, the English associated the concepts of occupation, use, and cultivation, as they all coincided in the English countryside. However, in North America, many groups used land that they did not occupy, and occupied land that they did not cultivate. The difference of legal institutions reflected deeper divergences between the environmental practices of the North American pre-colonial population and the newcomers: whereas most North American nations shifted the areas they cultivated providing nature time to regenerate, in Europe the same agricultural lands were farmed year after year.

Although the application of European institutions and legal criteria facilitated the appropriation of North American land, the straight use of European categories created a paradox. In Europe, land could be owned even if its proprietors decided not to cultivate it. How could Europeans justify the application of a different criterion in the case of North Americans’ lack of cultivation? The state of nature—a conceptual representation of life outside civil society, which applied to North Americans (but not to the settlers) and drew them into a backward state of social development—resolved this contradiction. According to English commentators, this state was characterized by the absence of a government able to

the colonies put in doubt North Americans’ right to land, combining it with a critique of metropolitan power. This was visible in the Mohegan case. See Ibid., 185-199.

Ibid., 54-55.

Banner claims that ‘large-scale English settlement often produced dramatic ecological changes that could be devastating to tradition Indian life. English hunters thinned the population of deer that the Indians had always hunted. English cows and pigs ate Indian crops, as well as the grass that had once supported the deer and other indigenous animals. English mill dams threatened Indian fishing.’ Ibid.

The peoples of North America defended their land against colonists’ acquisitiveness. In fact, most frontier wars originated from disputes about territory and the use of habitats. See Weaver, The Great Land Rush, 53.


Ibid. See also Banner, How the Indians Lost Their Lands, 32.

Ibid., 33.
recognize and enforce contracts and property rights in uncultivated lands. Grotius, Locke, and Vattel also referred to the state of nature in their theories. As I seek to demonstrate in the next section, this concept enabled them to base the legal justification of land appropriation in North America on an apparently objective criterion of efficient use of natural resources while retaining the conviction of European superiority and reintroducing it into the body of the law of nations.

Concluding remarks

As Soto and Vitoria had previously done, Grotius, Locke, Vattel, and Pufendorf reconciled God’s mandate to subdue the earth with a private right of individuals to seize it and exploit it. But these later authors had a somewhat different understanding of what God’s mandate to subdue the Earth and render it fertile meant. The efficient transformation of natural habitats was not only intended to secure the products necessary for survival and a dignified social life. In the course of the seventeenth and eighteenth centuries, humanity’s power over material reality, derived from the institution of dominium rerum, was increasingly oriented toward personal enrichment, the attainment of which was believed to engender general social affluence.

The mission of transforming the world’s landscapes did not rest, for instance, upon the head of the family or the community at large. It was the individual, or rather the owner, who could sit assured at the apex of God’s creation. As a result, the exploitation of natural resources became progressively disassociated from the direct achievement of common social goals. This shift was facilitated by the fact that most intellectuals of the period reconciled personal affluence and social wellbeing, arguing that the individual accumulation of wealth benefited society at large.

In the context of colonial expansion, the introduction of common and private property rights placed innumerable natural resources of non-European territories in the hands of those who were less interested in their protection, or, rather, those who most profited from their exploitation. In this process nature was stripped of the multifaceted meanings that societies around the world—including European ones—had attached to natural habitats for millennia. In the incipiently global capitalist economy that propelled

414 Ibid.
415 This critique is not a romanticisation of past times, but rather a defence of the prerogative of each social group to choose its own conception of the environment. Besides, I am convinced that there are always valuable things to be learned from the worldviews of others. Cultural relativism does not necessarily mean reification of ancient practices. One can be convincingly opposed, for example, to animal sacrifice in Mayan rituals, while valuing their use of music for healing and seeding, especially after modern science has demonstrated the value of music for patients and plants. For the influence of stimuli on plants see
social change in the colonies, nature’s significance was largely reduced to its consideration as a reservoir
of commodities.

For the rising maritime empires of the time it was imperative to find legitimate legal grounds to
establish settlements overseas. Trade and agriculture, two seemingly secular non-progressive legal
theories, became the cornerstones of the Dutch and English colonial enterprises. In theory, they
contributed to the ‘improvement of nature’ while increasing productivity and creating widespread
affluence. In reality, economic humanitarianism hinged upon a tighter control and more unsustainable
use of the natural realm.

Despite the apparent neutrality of the new legal standards, when applied to North America they retained
a bias inherited from the Spanish legal tradition. For it was rather difficult for Europeans to let go of
their belief in the cultural superiority of their own mores and economic practices. And, if the colonists
were not to be perceived as mere exploiters, it was vital to associate their rule and the appropriation of
natural resources with the progressive character of colonization. As we will see in the next chapter, the
conviction about non-Europeans’ inferiority was articulated through the theory of the state of nature and
conjectural history. The ideas and assumptions associated with these theories captured the imagination
of legal and political scholars, providing a timely narrative of difference and progress that justified the
subordination of colonial populations. As a result of this narrative, European superiority, which seemed
in principle dissociated from legal theories of land acquisition exclusively based on the land’s objective
condition, was reintroduced in the law of nations.

1476. For the therapeutic properties of music see, for instance, Kathi J. Kemper and Suzanne C. Danhauer, ‘Music as Therapy’
98 Southern Medical Journal (2005) 282-288. For an interesting analysis of the practical legal consequences of the use of
music according to different worldviews, see Sherylle Mills, ‘Indigenous Music and the Law: An Analysis of National and

416 Weaver has noted how the British doctrine of improvement privileged productivity rather than religious conversion or
cultural assimilation. See Weaver, The Great Land Rush, 134.
5 North Americans’ Savagery: From the State of Nature to Stadial Theory

In the beginning all the World was America.¹

The universalization of legal institutions that buttressed the political economy of European imperialism during the seventeenth and eighteenth centuries, produced a tangible effect associated to the legitimization of the increasing worldwide extraction and exploitation of natural resources. Trade and agriculture, for example, functioned as legal standards that validated European commercial presence in the East Indies and the establishment of settlements in North America. The profitable establishment of plantations and the exchange of natural products (turned commodities) provided an economic incentive to transform nature.

But the law of nations affected nature at a deeper, conceptual level. The capacity to master natural habitats became part of a universal standard of social ordering, whereby European nations arrogated a role as improvers of other—inferior—societies and their ‘wild’ environments. The conceptual appropriation of nature was possible through the development of an ideological justification whereby idle natural resources in non-European territories ought to be transferred from backward non-Europeans unable to efficiently exploit them to advanced Europeans capable of creating civilization out of wilderness.

As this chapter will show, the material and conceptual way in which the law of nations helped the appropriation of non-Europeans’ natural environments became fused. The articulation of North Americans’ cultural inferiority through a standard of environmental exploitation gave an almost irresistible force to the economic institutions that informed that standard. In stadial theory, private property and trade were presented as constituent elements of the highest stages of social advancement. As a result, the imposition of the particular European economic arrangements that bolstered capital

¹ Locke, *Two Treatises*, Bk II ChV §49 319 (italics in the original version).
accumulation seemed to be part of a larger necessary process oriented to the achievement of cosmopolitan progress.

The consolidation of these ideas was the result of centuries of speculation about non-European peoples’ use of natural ecosystems. The idea that some Latin American non-European societies were unable to master their surroundings was present in descriptions of colonial populations since the sixteenth century—it could be already found in the writings of influential scholastics such as Vitoria and Las Casas. For the Jesuit José de Acosta, all Latin American societies, excluding the advanced Mexica and Inca Empires, lacked that capacity. At the beginning of the eighteenth century, the Jesuit Lafitau continued Acosta’s line of enquiry, focusing exclusively on the study of North American pre-colonial societies. Important as these reflections were as sources of ethnological knowledge, the analysis of Acosta and the conclusions derived from it were superseded by other more influential conceptual ways of representing the alleged non-European backwardness.

The idea of the state of nature and social evolution captured the European imagination. Contractarian theories that explained the origin of civil society functioned by creating an antithetical state to the condition of civility. In the context of European imperialism, this state, known as the state of nature, transmuted its hypothetical nature into reality, capturing the pre-social condition of non-European peoples and, thus, the wild condition of their natural habitats. Eventually, a more sophisticated and explanatory theory of socio-economic change replaced the state of nature as the most accurate description of these societies. Trying to discover the universal economic norms that helped societies climb the ladder of progress, the historical and conjectural theories of Enlightenment intellectuals helped to better conceptualize non-Europeans and to explain the relationship between their societies and the natural habitats in which they lived.

The image of the state of nature and stadial theory provided the theoretical vocabulary to assimilate ‘savage’ North American peoples with their ‘wild’ environment, making the conquest and transformation of both an intertwined imperialist project. For most European thinkers and colonists the transition from a natural existence into a full, sophisticated social life in North America was only attainable through industry, technology, and goal-oriented toil. These distinctive elements, marks of European pedigree, were irrefutable proof of environmental mastery and the grandeur of nations that had gradually but assertively proved in practice their theoretical—as theorized by European intellectuals—supremacy over the non-European polities and natural habitats that came under their sway. Once within their power, Europeans could guide non-European humanity toward what they
thought and believed was a better life and, in so doing, transform non-European nature according to those high parameters of progress.

The ‘state of nature’ and North Americans’ savagery

One aspect of the colonial rivalry between the emergent Dutch and English empires and the older Spanish and Portuguese empires was the portrayal of one’s own imperial venture as a more benign undertaking than that of rival powers. In that vein, the Dutch criticized the excesses of the Portuguese (by then under the Spanish Crown) in the East Indies as part of a propaganda strategy to legitimize their seizing of the Portuguese commercial monopoly. The English, realizing that while Spanish imperial power was diminishing that of the Dutch was on the rise, sought to vilify the violent mercantile expansion of the Portuguese and Dutch while celebrating their own peaceful dealings with Asian rulers.

From the outset of their presence in North America, the English and Dutch dissociated themselves from the black legend of Spanish imperialism and the dubious religious grounds whereby the Spanish had justified the conquest of America and its peoples. Invoking their own previous condition as colonial subjects, the Dutch presented themselves as equals to and liberators of the Americans, and claimed that the latter had been subjected to the tyranny of the archenemy of the Dutch: the Habsburg. Based on an anti-imperialist agenda, Dutch expansion in the Atlantic was a belligerent move to counter the Habsburg aspiration to universal monarchy and world supremacy.

In the case of the English, gentle imperialism was not the only reason to search for a new legal approach to North America. Practical considerations recommended basing their presence and power in North America neither on conquest nor evangelization. While both titles might have legitimized English sovereignty, neither of them constituted an appropriate basis for claiming access to the land. Dispossessing the barbarians based on conquest or evangelization was precisely what the English had criticized about Spain’s imperialism in America. But the land question was pressing in North America and could not simply be set aside. Due to the lack of precious minerals in the English colonies,

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2 For the rivalry between colonial powers see, for instance, Black, Europe and the World, 57. For the struggle for legitimacy see William J. Eccles, ‘Sovereignty-Association, 1500-1783’ in Armitage, Theories of Empire, 203-238, 204-205.
agricultural land and exportable natural resources were vital for the new colonial economy. If it was to succeed, the English settlement scheme in North America had to be based on individual farms, commercial agriculture, and transcontinental trade. It was then crucial to find a novel legal criterion that would afford direct access to the land and the natural wealth of America.

Considering this colonial context and the centrality of landed property, it seems natural that seventeenth century Protestant natural lawyers rejected the dissemination of Christianity as a valid ground for colonization, and searched for further justifications. They thus exposed religious motives as a mere pretext for their rival’s subjugation of non-European populations. Grotius, for example, denied the applicability of the right of discovery to those who ‘hold wrong views about God’. Similarly, Wolff noted that it was contrary to the law of nations to subdue another nation for the purpose of evangelization.

But not all Protestant lawyers criticized the doctrines of the Spanish scholastics. Grotius, for instance, invoked Vitoria as an authoritative anti-colonial voice, to denounce the dissemination of civilization as the gentle façade of Empire. He asserted that ‘[t]o wish to impose civilization upon uncivilized peoples is a pretext which may serve to conceal greed for what is another’s’. Pufendorf made a diametrically opposed reading of Vitoria’s *ius gentium*, thus adopting a less lenient approach to his theories. He claimed that Vitoria’s universalism served an imperial agenda, as Spanish rights under the law of nations were used to subject ‘the Indians’ to Spanish power. He was particularly disapproving of cosmopolitan justifications such as those based on natural society and communication. In a similar vein, Vattel condemned as unjust the Spanish conquest of the civilized Mexica and Inca empires.

By rejecting conquest and presenting themselves instead as a commercial and agricultural nation in North America, the English tried to prove that their own rule was morally superior to that of the Spanish. In this sense, Locke’s defense of trade and agriculture—the so-called agricultural argument—became one of the main ideological bases for English imperialism. Even when conquest was undertaken by

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10 Pufendorf, *De Iure Naturae*, BKIII CHIII §9 364-365.
11 Ibid.
13 See Pagden, ‘The Struggle’, 37. The moral question was not the only reason for the different justifications of the Spanish and English empires. The diverse demography, political, and military power of South American and Mesoamerican societies in comparison to North American’s ones played an important role as well. Ibid., 41.
force, as in the case of Virginia, settlers liked to think of themselves as 'improvers' of the land, protesting that they were anything but conquerors.\textsuperscript{15}

To be sure, whereas at the level of rhetoric the defense of cultivation as a superior model of land production was presented as a more legitimate ground for power than the evangelizing mission, in practice its defense served the economic interests of the metropolis. In turn, the power of the vocabulary of improvement concretely contributed to the dynamic of occupation and colonization: the argument that agriculture would naturally create prosperity in the North American colonies encouraged the expansion of farms and plantations.

Besides, the English claimed that North American peoples, who wanted to prevent the risk of Spanish conquest and enslavement, had welcomed them.\textsuperscript{16} In compensation for offering to share their extensive territories, the peoples of North America could enjoy the economic development generated around the first English settlements.\textsuperscript{17} Still, the apparent objectivity and neutrality of the English and Dutch legal justifications created a conundrum. How could they reconcile the legitimacy of the agricultural argument and the supposedly fair treatment of North American peoples with the conviction—widely shared by colonial administrators, scholars, and settlers—of the latter's inferiority?\textsuperscript{18}

Grotius, Locke, and Vattel resolved this problem by justifying the acquisition of property and sovereignty in North America by ridding their theories of the standard religious and other culturally subjective categories, yet later reintroducing them through recourse to the concept of the state of nature. The state of nature, in its ‘modern’ use, was part of social contract theory elaborated by post-scholastic natural lawyers in Northwest Europe during the seventeenth century.\textsuperscript{19} The division of European polities along confessional lines encouraged post-Reformation intellectuals to search for a non-transcendental

\textsuperscript{15} Ibid., 51. According to Tuck this claim was related as well to the different legal systems that were applied in the case of settlement and conquest, justifying the latter a much wider influence to the English Crown in American affairs, something the colonists tried to prevent. See Tuck, \textit{The Rights}, 121.


\textsuperscript{17} For mainstream Enlightenment thinking, colonization offered non-Europeans a short-cut to progress; that is to say, the possibility of passing directly from their savage condition to the highest degree of social evolution (represented by a settled commercial life) without the inconvenience of having to go through intermediate stages of development. See Wolloch, \textit{History and Nature}, 130.

\textsuperscript{18} The English sentiment of superiority is described in James Axtell, \textit{The Invasion Within: The Contest of Cultures in Colonial North America} (Oxford, Oxford University Press, 1985) 131-133.

\textsuperscript{19} Ian Hunter and David Saunders (eds.), \textit{Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought} (New York, Palgrave Macmillan, 2002) 2.
The metaphysical character of scholastic natural law made it amenable to the interests of the Catholic Church, threatening the sovereignty of Protestant states.\textsuperscript{20}

The state of nature was a metaphor used in political philosophy to describe a state of affairs characterized by the absence of civil society and political authority. For instance, Hobbes, one of the most influential contractarians, argued that because individual security and material well-being were compromised in the state of nature individuals had to join to form civil societies by pact, delegating political power to a sovereign ruler. In a period marked by severe religious confrontation and violence, natural law theorists found in the hypothetical condition of the state of nature and the social contract thereof a solid theoretical foundation for a robust state that would guarantee security in a Protestant society.\textsuperscript{21}

The desacralization of sovereignty and the guarantee of security did not exhaust the implications of the state of nature. Projected into non-European territories the state of nature represented as well a backward conception of the good life that had to be transcended. In the state of nature material life was characterized by extreme simplicity. This state of backwardness could not be transcended without a civil society with a vibrant economic life that generated prosperity and material abundance.

In this sense, the state of nature could be contrasted to the state of society (incarnated by the mores, arts, and industry of European Protestant nations) which was equated with advancement and refinement. Even if the state of nature was described in positive terms, civility was always preferable. As Pufendorf noted, it was not ‘likely that the human race, even though free from sin, would have remained for all time within the limits of a single garden, subsisting on the fruits furnished by nature, without advancing in civilization through industry and the inventions of art’.\textsuperscript{22}

The ‘material dimension’ of the state of nature was not mere conjecture. Its conceptual value (as a contrast to the advantages of living in society) was also used as a powerful image of reality. As imperial powers continued expanding, European intellectuals actually adopted the idea of the state of nature coupled with a progressive lens to describe how the non-European world (particularly North America) truly was, and how colonial populations could be understood and disciplined. For most natural lawyers, such as Grotius, Locke, and Vattel, the state of nature described the way in which the peoples of North

\textsuperscript{20} Ibid., 3.
\textsuperscript{22} Pufendorf, \textit{De Iure Naturae}, Bk I Ch I §11 11.
America lived at the time of European occupation. Grotius never explicitly used the term, but described a situation akin to it:

This primitive state might have lasted if men had continued in great simplicity, or had lived on terms of mutual affection such as rarely appears. Of these two conditions, one, exemplified in the community of property arising from extreme simplicity, may be seen among certain tribes in America, which have lived for many generations in such condition without inconvenience.23

Grotius characterized the primitive state of certain North American groups as one of utopian benevolence. Even so, the worth of such life was not attributable to the moral quality of those ‘tribes in America’ who lived in that condition. On the contrary, absence of conflict was the result of ‘ignorance of vices rather than knowledge of virtue’.24 This notwithstanding, humanity did not remain under that order eternally. Eventually, humans abandoned their primitive life by turning ‘their thoughts to various kinds of knowledge’.25 Once social development was set in motion, ambition pushed individuals to divide everything they possessed. Afterwards, they gathered to form countries.26 It was from this perspective that the communities of North America had failed to achieve the higher stages of human development.

For Grotius, the desire for material and moral progress compelled humanity to leave a stage characterized by inherent primitivism. That is to say, ‘men were not content to feed on the spontaneous products of the earth, to dwell in caves, to have the body either naked or clothed with the bark of trees or skins of wild animals’.27 Instead, ‘they chose a more refined mode of life’ which ‘gave rise to industry’.28 Once humans decided to apply their industry to the modification of their surroundings, material prosperity increased.

Similar to Grotius, Pufendorf did not mention North American peoples as example of barbarism and simplicity, but his description of these states matched the common features associated with North American peoples at that historical time. It is still worth noticing that Pufendorf acknowledged that different political communities could change from a regime of common to private property at their own

24 Ibid., 187.
26 Grotius, De Jure Belli, Vol II Book II Ch II. §3 188.
27 Ibid., Vol II Book II Ch II. §4 189.
28 Ibid.
convenience. He affirmed that ‘backward peoples’ did not violate natural law even in cases where they retained several of the features associated with primitive community.29

Locke explicitly referred to the state of nature in his work. Even though he never actually placed America or its inhabitants in that state, his affirmation ‘Thus in the beginning all the World was America, and more so than that is now’30 had the same effect.31 Moreover, in the chapter ‘Of Property’ of the Two Treatises of Government he drew a clear-cut distinction between the ‘Indian’ who hunts his deer and ‘those who are counted the Civilized part of Mankind’.32 Locke placed North Americans in inferior position vis-à-vis European nations. He had no doubt about the superior environmental mastery of the English nation. They had achieved a more sophisticated life than the Americans by applying effort and industry to the modification of nature:

There cannot be a clearer demonstration of anything, than several Nations of the Americans are of this, who are rich in Land, and poor in all the Comforts of Life; whom Nature having furnished as liberally as any other people, with the materials of Plenty, i.e a fruitful Soil, apt to produce in abundance, what might serve for food, raiment, and delight; yet for want of improving it by labor, have not one hundredth part of the Conveniences we enjoy.33

Locke traced North Americans’ poverty back to their laziness. The lack of material prosperity comparable to European states was not the result of the deficiency of their natural habitats. In fact, they inhabited rather fertile and abundant territories. According to Locke, their lack of material progress merely derived from their lack of any desire to improve their natural habitats by exploiting their economic potential. This explained why God had given the Earth to the ‘Industrious and Rational’ ‘men’34, represented by the English and their superior material culture.

In contrast to the simple material life of North Americans, English economic prosperity had helped lift the standard of living for the whole English nation. The benefits of individual wealth accumulation had spread to society at large. It was not surprising, then, that even the North American nobility could not match the living conditions of the lower classes of English society. Locke was sure that the noblest

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29 Ibid.
30 See supra footnote 1 (capitals and italics in the original version).
31 Allan Greer affirms that Locke conceived pre-colonial America as a place without law, and that its lands constituted a commons of universal scope, corresponded ‘to nature itself’. See Greer, ‘Commons and Enclosure’, 368.
32 Locke, Two Treatises, Bk II ChV §30 307.
33 Ibid., §41 314. See also his comparison between the English and North American countryside, Ibid., §37 312.
34 Ibid., §34 309.
and richest chief of any polity in North America lived worse than a mere ‘day Laborer’ in England. In Locke’s view, this cross-social and cross-class comparison of status was a definite proof of the economic benefits of modern European society compared with more backward ones.

Equating the advancement of civil society with the systematic application of industry in order to modify nature meant that, in order to transcend the state of nature and promote social progress, natural resources had to be thoroughly exploited. According to Aravamunda, Locke believed that ‘out of the process of mastering nature arises society, and from society, government’.

In principle, North Americans could follow the path outlined by the English. They were welcome to adopt a sedentary life and cultivate both the land and the qualities that English valued. Once they had embraced English education and culture they could have a share in God’s gift. That meant, paradoxically, possessing the land and enjoying the natural resources that had once been their own.

For Wolff, civilized and cultured nations represented the ideal to which barbarous nations should aspire. His reasoning for this differentiation was typical of Enlightenment thinking. The divergence between these two types of nations rested on the cultivation (or lack of) of intellectual virtues. The gap between both groups of nations had significant practical repercussions as only civilized could participate in the creation of the law of nations. The hierarchical ordering of civilized and barbarous nations did not exhaust Wolff’s attempt to make sense of cultural difference in the colonial encounter. He introduced a third category that he termed ‘separate families’, in which he included North Americans. Wolff did not portray them as living in the state of nature, but nonetheless he denied them civil sovereignty and the status of a nation, and hence the rights and duties that nations enjoyed.

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35 Ibid., §41 315.
38 Ibid.
39 Wolff, Jus Gentium, Ch I §52-54 33-35. He defined a cultured nation as ‘a nation which cultivates intellectual virtues, consequently desires to perfect the intellect, and therefore develops the mind by training’. A civilized nation was that which had ‘civilized usages or usages which conform to the standard of reason and politeness’. Ibid., Ch I §53 34.
40 Ibid.
41 Wolff argued that the will of all the nations was tantamount to that which seemed best to the majority. But as in practice a gathering of all nations was not possible, what counted was then that which the most civilized nations had in exercise of right reason decided. Ibid., Prolegomena §20 17.
42 Ibid., Ch III §309 157 and §311 159.
In Wolff’s legal framework, the peoples of North America were excluded from what he called the supreme state, which was formed by the aggregation of all the world’s nations. Consequently, they were also excluded from the law that existed between those nations. This denial of international agency occurred precisely at the time when it was most necessary, as the arrival of the newcomers threatened North American societies, putting their way of living in jeopardy.

In practice, a lack of participation signified that they could not influence colonial debates on the legal title for land acquisition. The lack of international legal status within the family of nations had deleterious consequences because, as Banner reminds us, the law and its hidden structural violence played a paramount role in the colonization of North America:

The story of the colonization of the United States is still a story of power, but it was a more subtle and complex kind of power than we conventionally recognize. It was the power to establish the legal institutions and the rules by which land transactions would be enforced. The threat of physical force would always be present, but most of the time it could be kept out of view because it was not needed.

Still, we should bear in mind that in spite of Wolff’s civilized-uncivilized distinction and his conviction that ‘separate families’ could not be regarded as nations, he avoided the kind of rationale that most European powers used to submit colonial populations. In a long argumentation on whether ‘separate families can be subjected to civil sovereignty’ he concluded that liberty could not be taken away from ‘those who are unwilling’ to enter civility, and that ‘the desire to promote the perfection of another’ gives ‘no right to compel him to allow that to be done by you’. This was an important corrective to imperialistic claims based on the superiority of European mores. Even environmental mastery could not be used as an excuse to advance European interest in America. No right of occupation was created for foreign nations just because they could exploit nature more efficiently than separate families. But, that said, Wolff’s ambiguity resurfaced once again, introducing a caveat to his opposition to a standard of environmental superiority. His conclusion that Europeans did not have a right to occupy the land that

43 Drawing a comparison between individuals and nations, Wolff argued that nations living in the state of nature combined in a supreme state in much the same way as individuals living in the state of nature combined to form a nation. In the state of nature the law of nations applies, and this is what forms the necessary law of nations. Ibid., Prolegomena, §9-§10 13.
44 Banner, How the Indians Lost Their Lands, 6.
45 Wolff, Jus Gentium, §313 159-160.
46 Ibid.
belonged to North American peoples due to their superior mastery over nature applied only as long as the land did ‘not remain uncultivated’.\(^{47}\)

Vattel argued along similar lines as Grotius, Pufendorf, and Locke, by theorizing the state of nature as the primitive community of ownership at the dawn of humanity.\(^{48}\) North Americans, he believed, had remained in that condition without evolving. This was evident because they still made their living from hunting and ‘their flocks’.\(^{49}\) That type of life belonged to an ancient era, to ‘the first age of the world’. Therefore, it had to be substituted with the practice of other nations, more ‘industrious’ and too ‘confined’ in their small European territories.\(^{50}\) Following Locke, Vattel affirmed that Americans lived an ‘idle mode of life’.\(^{51}\) For this reason ‘the savages tribes of North America had no right to keep for themselves the whole of that vast continent’, and others could thus settle there without injustice.\(^{52}\) In contrast with the ‘savages’, the distinctive features of advanced nations were the arts and sciences. These were supreme activities, which could only be criticized by the friends of barbarism.\(^{53}\)

The application of the concept of the state of nature to define the reality of North American polities downgraded their environmental, economic, social, cultural, and political achievements. Its ‘colonial’ use constituted one of the ‘defining exclusions’\(^{54}\) through which the Other and the self were constituted in the era of development of the law of nations.

Many other commentators shared similar views. For instance, Hobbes, one of the earliest formulators of the concept, had no scruples in affirming that the peoples of North America still lived in a ‘brutish manner’.\(^{55}\) Their primitiveness compelled European nations to plant colonists on the other side of the Atlantic, forcing North Americans to abandon their nomadic life and settle to cultivate a little of land.\(^{56}\) In his book \textit{De Cive} he distinguished (in an illustration) between the state of \textit{Dominium}, which corresponded to European agricultural landscapes, and the state of \textit{Libertas}, which represented North Americans’ reality as one characterized by hunting, scarce cultivation, and savagery.\(^{57}\) Montesquieu

\(^{47}\) Ibid.
\(^{48}\) Vattel, \textit{The Law of Nations}, Bk II Ch IX §117 149. See also Ibid., Bk I Ch XVIII §203 84.
\(^{49}\) Ibid., Bk I Ch VII §81 38.
\(^{50}\) Ibid.
\(^{51}\) Ibid.
\(^{52}\) Ibid., Bk II Ch VII §97 143. Vattel used the word ‘savage’, the common way in which Enlightenment intellectuals referred to North Americans.
\(^{53}\) Ibid., Bk I Ch XI §113 48.
\(^{54}\) I have borrowed the term from Pahuja. See Pahuja, ‘The Postcoloniality’ 461.
\(^{56}\) Ibid., 89. This view accommodated Hobbes’ personal interests as a Virginian landowner. See Tuck, \textit{The Rights}, 128.
\(^{57}\) Ibid., 137. The full implications of Hobbes ideas are explored in-depth in Aravamudan, ‘Hobbes’. 227
agreed that only those who cultivated the land were able to form a great nation. For the same reason, he described hunters and shepherds as savages and barbarous, unable to form a prosperous nation. He also situated that type of backward human beings in the continent of America.

The use of the state of nature as a criterion to describe the degree of advancement of different societies was based on the conceptual assimilation of non-European populations to their environment. North American savages fused with the wilderness they inhabited. This analogy is exemplified by Wolff’s use of the term ‘uncultivated’ to refer alternatively to the culturally backward condition of people as well as to the wild state of the environment. Similarly, Locke defined nature, undomesticated animals (beasts), and ‘Indians’ as ‘wild’. Canup has underlined New England colonists’ tendency to regard American peoples as the human face of American wilderness, a wilderness that had to be extirpated from North America before civilization could ever flourish. So, the colonial agenda of European imperial powers in North America was in part justified by one and the same objective of transcending wilderness through the exploitation of nature. Human domination over nature as prescribed by God became indistinguishable from the domination of inferior peoples like the peoples of North America, who by lack of will or capacity still merged with nature.

An early account of progressive history: North Americans in the eyes of Lafitau

The opposition between the state of nature and civility entailed a distinction between two conditions that represented the lower- and higher-most forms of social life. Whereas the former—incarnated by the peoples of North America—was characterized by human simplicity and proximity to nature, the latter—personified by European colonists—implied human sophistication and ascendancy over nature. The superiority of the social over the natural sphere was a definite feature of a refined life. But the existence of two static states at both ends of the spectrum did not per se explain how humanity—or rather part of it—had evolved from a backward social condition to a more complex one.

58 Montesquieu, The Spirit of the Laws, Bk 18 Ch 10 290.
59 For the application of the term as a measuring stick of human development, see Wolff, Jus Gentium, Ch 1 §52 33-34. For its use to characterise the environment, see (among others) Ibid., Ch III §279 142. Pufendorf also used the term ‘uncultivated’ to refer to people that were regarded as socially undeveloped. See Pufendorf, De Iure Naturae, Bk III Ch III §9 363.
60 Locke explicitly used the expression ‘wild Indian’ (italics in the original). See Locke, Two Treatises, Bk II Ch V §26 305. He also referred to nature as the ‘vast Wilderness of the Earth’, Ibid., §36 311.
61 Canup, Out of the Wilderness, 62. Canup tells how the whole English colonization of New England is marked by the anxiety of escaping savagery. In this context, the preservation of English civility was linked to the taming of American nature.
During the Spanish colonization, Christianity had provided the vocabulary of an evangelical mission that, together with conversion, allowed it to bridge the material gap that according to Spanish scholars separated American commonwealths from European nations. Bartolomé de Las Casas and José de Acosta, for instance, associated Americans’ conversion to Catholicism with the transition toward more advanced social forms. However, the explicit use of religious categories as a standard for social improvement in the colonial context was discredited and, hence, it was no longer a viable option for Protestant natural lawyers of the seventeenth and eighteenth centuries.

How could, then, European intellectuals conceive the relationship between European and non-European communities in a progressive fashion without recourse to such a vocabulary? Was there a secular vocabulary through which they could theorize the path needed to elevate their colonial subjects from the abject condition in which they found them?

In addition, the classical theory of the state of nature was affected by a major shortcoming. It tended to present the state of nature/civility opposition as exceedingly static, lacking a powerful explanation of how colonial populations could be lifted from their backward condition. There was a need for a road map to social change, for a dynamic narrative of social amelioration that explained the intermediate steps necessary for the transition from the state of nature to civility.

Already in the sixteenth century Bartolomé de Las Casas had hinted at such a narrative of social advancement in his *Apologética Historia Summaria*. By comparing American polities to great civilizations such as the Greeks and Romans, he intimated that American commonwealths were more complex than Spanish commentators usually conceded. But, in addition, these comparisons meant that while the historical gap that separated Spanish and American commonwealths left the latter’s potential for social development intact, it also implied that they lagged behind. In his *Historia Natural de las Indias*, the Spanish Jesuit José de Acosta distinguished different degrees of barbarism in America, and explained how American societies had climbed from backwardness to a more refined social life. For both Las Casas and Acosta the comparison between different commonwealths and the delineation of certain stages of social development were also a way to make sense of the diversity that existed among the numerous (some more ‘developed’, some less ‘developed’) American polities.

During the *siècle des lumières* the French Jesuit Joseph François Lafitau (1681-1746) continued the genre of early ‘comparative ethnology’ in the tradition of its Catholic forerunners. His approach was

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62 See the discussion in Chapter 3, pages 131-132.
63 See the discussion in Chapter 3, pages 137-141.
closer to Las Casas, as he compared the customs of the ‘American Indians’ with those of antiquity in his early eighteenth-century opus Mœurs des Sauvages Amériquains, Comparées aux mœurs des Premiers Temps. The main purpose of his anthropological study of North American peoples was to demonstrate the existence of common religious roots that united humanity. But, as in the case of Las Casas, the comparison between nations past and present underlined North Americans’ primitiveness. Life in America seemed to have almost frozen, evolving under the slower rhythm of a sluggish historical clock.

As in the cases of Las Casas and Acosta, Lafitau’s study of North American peoples, the Iroquois and Hurons in particular, was oriented towards the missionary objective of ‘spiritual salvation’ of the ‘barbarians’. This entailed, in his own words, the effort of bringing ‘Indian mores … into conformity with the laws of Jesus Christ’. By showing that North American peoples had religion, customs, and worshiped a divinity, he could provide a theoretical basis for evangelization. However, more than the issue of salvation, he was interested in countering the trends of theism, atheism, and libertine thinking in the France of his time. By showing that non-European nations such as the Mohawks, Iroquois, and Huron had a notion of God, he could actually prove the universality of the human religious impulse. Lafitau believed that no nation was ‘so barbarous as to have no religion or sanctioned customs’. Furthermore, he proved that the Indians had a notion of the Flood, which demonstrated that the human race had a common origin and that, as descendants from Adam, the peoples of America were fit to receive the Gospel.

In his depiction of the peoples of North America, Lafitau tried to strike a balance between their positive and negative images. First, he rejected the idea of the ‘bad savage’; that of a ‘gross, stupid, ignorant and fierce’ creature almost devoid of reason. North American peoples had a number of positive qualities;

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64 I have used the English translation of the text. Father Joseph Francois Lafitau, Customs of the American Indians Compared with the Customs of Primitive Times, edited and translated by William N Fenton and Elisabeth L. Moore (Toronto, The Champlain Society, 1974).
65 Lafitau knew Acosta’s work well. He cites it at Ibid., Vol I, Ch I 31.
66 Ibid., 41.
68 Lafitau, Customs of the American Indians, Vol I, Ch I 29 and 35.
69 Ibid.
70 Ibid., Vol I Ch II 86.
71 Ibid., Vol I Ch III 90.
they even surpassed the achievements of Europeans in certain spheres of life. But, Lafitau also claimed, there was a dark side of North Americans that revealed their laziness, cruelty, brutality, and viciousness.

Lafitau maintained that in addition to these personal negative traits, North Americans were also impaired by collective deficiencies. The main one, he said, was their rudimentary material life. They had not developed the arts that had helped Europeans attain a more refined life. For the pious Father Lafitau there was always a positive side of Americans’ simplicity, related to the absence of the vices that stemmed from ‘luxury and abundance’. Still, North Americans’ simplicity seemed to have exceeded the limits of frugality for the wrong reasons. It was not their devotion but their laziness that deprived them of the comfort of an easy life. Lafitau complained that even long after contact with the Europeans they had not yet acquired the material improvements, which would have made their lives easier.

As with Acosta, part of Lafitau’s work revolved around the question of how America was populated. He explained this phenomenon by reference to successive waves of migration. The first peoples of the world, especially those who hunted, gathered, and fished, needed to relocate as soon as their number increased. This was so because they were nomadic. They practiced neither agriculture nor herding, thus needing vast expanses of land to satisfy their basic needs. In contrast, groups that eventually settled and lived from cultivation enjoyed a more comfortable life. Still, the rudimentary nature of their methods caused soil exhaustion, forcing them again to relocate. Therefore, for Lafitau, the effort to make the Earth more productive explained ‘the origin of colonies’.

In the opinion of the French Jesuit North America had been populated throughout different periods of migration. As part of this process, the most ‘primitive and uncultivated’ groups were pushed by the most ‘civilized … inhabitants of Peru and Mexico’ to the shores of the North Sea. He gave a familiar explanation of the material simplicity that characterized most American commonwealths. Ignorance of the most rudimentary arts, like the use of fire to modify their surroundings, was a product of their ‘laziness and indolence’. Had they not been reluctant to undertake too much work, they could have advanced in material comfort, following in the footsteps of their more socially advanced neighbors.

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72 Ibid.
73 Ibid.
74 Ibid., 91.
75 Ibid.
76 Ibid., Vol I Ch II 51.
77 Ibid.
78 Ibid.
79 Ibid., 49-50.
80 Ibid., 49.
81 Ibid.
According to Lafitau, hunting and fishing were the main productive activities of the peoples of America. They were the sources of provision, clothing, and the fur trade. But they also conveyed a sense of primitiveness. According to Lafitau: ‘hunting and fishing were, so to speak, the first occupations of the first men whom necessity forced to live in the forests with which the earth was then bristling or on the shores of rivers and the sea.’ By reference to a particular set of productive activities, Lafitau created a conceptual temporal line that united North Americans with the ancestors of humankind. In addition, there was something else that they shared: their ignorance of the true faith. Due to their misguided imagination, North Americans, like certain peoples in antiquity, had turned natural elements like rivers, lakes, and fountains (using Lafitau’s examples) into deities.

Lafitau’s work contained only sketchy references to progressive history. He associated different productive activities to different degrees of social complexity, and compared North Americans with the peoples of so-called ‘primitive times’. But he did not give a comprehensive explanation of the laws that stimulated socio-economic historical development. The strength of his treatise lay instead in the detailed study of North American society and the ethnographic material he provided thereof, which turned out to be useful to Enlightenment intellectuals, rulers, and colonial administrators. Adam Smith (1723-1790), for instance, used Lafitau’s anthropological study of North American societies to ground his economic theory on the empirical observation of backward societies. But Lafitau’s work lacked the kind of teleology that would have made his work theoretically relevant in the second half of the eighteenth century, a period in which the theories of natural lawyers and philosophers were oriented toward the exploration of general rules of socio-economic change that were conductive to the wealth of nations.

**Progressive history: toward stadialism**

Following in the footsteps of Isaac Newton (1642-1727)—who had ‘discovered’ the rules of the physical world—Enlightenment intellectuals attempted to unveil the universal rules that governed social improvement on a planetary scale. From this progressive perspective, all the world societies were considered to have evolved following certain universal parameters. Lafitau’s work had little to say on the question of the social progress of humanity. There was another shortcoming in the kind of ethnographic work that he undertook. Even though he was less interested than his Catholic forerunners

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82 Ibid., Vol II Ch V 187.
83 Ibid.
in the evangelization of North American peoples, there was still a clear religious ring to his writings. There was still no social theorizing outside the theological framework.

A more elaborate progressive narrative could be found in the writings of some Protestant natural lawyers during the seventeenth century. In the doctrines of authors such as Grotius, Locke, and Pufendorf, there was a—not yet fully developed—association of productive forces, private property, and social improvement. Different modes of production that corresponded to different social stages were hierarchically ordered in regards to their conduciveness to the creation of private property rights.

Already in De Iure Praedae Grotius identified different stages in the development of private property related to different forms of production. First, the satisfaction of basic needs such as food and clothing fostered pastoralism and agriculture, making necessary the extension of the institution of dominium proprietatis from movable to immovable things. Commerce appeared at ‘a subsequence stage in the evolution of property’. But Grotius left unexplained the sort of dynamic that drove the transition away from pastoralism and agriculture.

In the De Iure Belli he filled this gap, linking the change in property regime to the desire for material amelioration. ‘Men were not content to feed on the spontaneous products of the Earth’, Grotius contended. Gathering was the basis of a simple type of life that was no longer satisfactory; the perfection of society required a change in the way natural resources were used. So, taking possession of land and making it productive through human industry contributed to ‘the advantage of life’. The increase in human population provided a further stimulus to divide the Earth. In Grotius’ biblically-inspired account of the origin and development of private property there was a logical correlation between material production, social development, and the privatization of natural resources.

Pufendorf concurred with Grotius (and also cited him) on the reasons for the transition from common to private property. Not unlike Grotius, he saw a correlation between human industry and progress conceived as material refinement. He agreed with those who believed that:

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85 Fitzmaurice, for examples, affirms that Locke produced an embryonic stadial theory. See Fitzmaurice, Sovereignty, 201.
86 Grotius, De Iure Praedae, Ch XII 228.
87 Ibid., 230.
88 Grotius, De Iure Belli, VolI Book II Ch II II. §4 189.
89 Ibid., §5 189-190.
90 Pufendorf, De Iure Naturae, Book IV Ch IV §9 546. See also Ibid., §13 554.
We should bear in mind the disposition of unlettered and agricultural peoples, which is so clearly inclined to ease and sluggishness, and averse to labor. And that the more unrefined and simple the life of any people, the less place they hold, while a richer and more refined manner of life requires great industry and extended endeavor.91

The increasing sophistication of social life required holding ‘more place’ and applying effort to its modification. The exploitation of natural resources provided societies with the conveniences necessary for a better life. In a later passage Pufendorf reiterated this idea, by affirming that ‘the nature of man’s mind show clearly enough that among a great number of men, who are undertaking to advance life by various arts, a quiet and decorous society cannot exist without distinct dominions of things’.92 In addition to creating prosperity these private dominions were to serve a higher cosmopolitan goal, as they provided the legal foundation for a more efficient system of production that deactivated the ‘bomb’ of population growth. The Earth could not have sustained its population without ‘cultivation and improvement’ based on land property.93

In Pufendorf’s account of the change in property regime, the private appropriation of nature and its exploitation marked a first step toward progress. But there was one further step in the transition from a simple to a refined life. Commerce had to evolve from barter, or the exchange of goods, to monetized markets. The desire for luxuries had made markets grow from a local and national ambit to a transcontinental sphere of operations. This shift was notorious ‘in civilized states where citizens are divided in different social orders’.94 At the other end of the spectrum were ‘those nations which are unacquainted with the use of currency’, nations that, according to Pufendorf, had ‘no part in the advances of civilization’.95 One concrete example of the type of advances he was referring to was the decision of the nations ‘which have enjoyed a higher level of culture, to set by agreement an eminent price on a particular thing’.96

For Pufendorf commerce was the foremost driver of economic life and, hence, a notable vehicle for a ‘more civilized and rich life’.97 The increase in the complexity and refinement of social life was related

91 Ibid., §8 543-544.
92 Ibid., §14 555.
93 Ibid., Book IV Ch V §4 560.
94 Ibid., Book V Ch 1 §11 690.
95 Ibid.
96 Ibid., §12 690 (italics in the original).
97 Ibid., Book VII Ch I §6 958. Despite the centrality of commerce for the life of a nation, he still believed that the raison d’être of the state was the guarantee of security.
to the emergence of cities and markets, rather than due to the adoption of any specific political form by a certain social community.

Thus, the progressive histories of Pufendorf and other seventeenth-century natural lawyers articulated the theoretical threads that could be found, in a more developed manner, in later authors who expounded a stadial theory of social development that linked progress and material production.

To be sure, precedents of the stadial theory could already be found in ancient times. For instance, in the work of Dicaearchus, a disciple of Aristotle, he elaborated a three-stage theory of social improvement related to different productive activities.\textsuperscript{98} For that purpose, he drew on Aristotle’s description of the various ways of life that humans had historically adopted.\textsuperscript{99}

Yet stadial theory, in its most elaborated version, was very much a product of the eighteenth century. At that stage, the insecurity originating from the Wars of Religion had largely receded, and the improvement of human life through economic activity in England and France had gained central stage in the theories of Enlightenment intellectuals. The economic trajectory of the most advanced European societies became the focus of intellectual attention. The most prominent European thinkers of the time set themselves the task of discovering the natural laws that governed the creation of wealth so as to promote, question, or criticize their nation’s international standing and/or grandeur, or to provide an explanation of international life grounded in political economy.

The Swiss man Emer de Vattel was one of the writers who contributed to this discourse, attempting to make sense of historical development based on universal economic categories. He explained the transition from a situation akin to the state of nature to a more settled life on the basis of change in a society’s system of production. At the same time, this change was related to the origin of private property. Society, agriculture, and private property had made their appearance at one and the same historical juncture, once humanity was forced to use its natural resources more efficiently. As he argued:

When the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture, sufficient support for its inhabitants; neither could it have received proper cultivation by wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere, and appropriate to themselves portions of land, in order that they might, without being

98 Garnsey, *Thinking*, 139. Grotius’ own conception of social development was inspired by Dicaearchus. Ibid., 140. However, his idea of the state of nature departed from Golden Age narratives that represented the primeval human existence in positive terms, borrowing instead from more negative accounts of human past developed by Presocratic philosophers, atomists such as Democritus and Epicurus, and Lucretius. Ibid., 109.

99 Ibid.
disturbed in their labor or disappointed of the fruits of their industry, apply themselves to render those lands fertile, and thence derive their subsistence from them. Such must have been the origin of the rights of *property* and *dominion*.\(^{100}\)

But hard work, Vattel argued, was not enough to trigger social advance: ‘Science and the polite arts’ were of primary importance to encourage a positive societal change.\(^{101}\) Civilization could only flourish through the scientific knowledge of nature and the application of suitable technology to actualize its economic potential.

Montesquieu went one step further toward stadialism in the *Spirit of the Laws*, making an important association between the laws of different nations and ‘the way that various peoples procure their subsistence’.\(^{102}\) He showed that the code of norms of a commercial society was more developed than that of an agricultural society. By the same token, the codes of the latter surpassed those of pastoral societies in extension and quality. This was so because cultivation implicated the development of ‘many arts and much knowledge’.\(^{103}\) Finally, there were the ‘people who’ lived ‘by hunting’, who had the least developed codes.\(^{104}\) Actually, they had so few norms that they could plainly be called ‘mores rather than laws’.\(^{105}\) Barbarians (pastoral peoples) and savages (hunting peoples) also differed, in that the former formed nations that were capable of uniting for a common goal.\(^{106}\) He conceded that each society had its own rules and that ‘all nations’, ‘even the Iroquois’ who ate ‘their prisoners’, ‘had a right of nations’.\(^{107}\) But if law was tantamount (as he believed) to ‘human reason’,\(^{108}\) then it was clear which kind of society the enlightened philosopher valued the most.\(^{109}\)

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101 Ibid., Bk I Ch XI §113 48.
103 Ibid., Ch 15 292.
104 Ibid., Ch 8 289.
105 Ibid., Ch 13 291 (emphasis in the original).
106 Ibid., Bk 18 Ch 11 290.
107 Ibid., Bk I Ch 3 8.
108 Ibid., 9.
109 Still, Montesquieu noticed the positive features of American systems of production. Because they were not attached to the land, they enjoyed a great deal of liberty. Moreover, without money there were less material desires and, hence, equality ‘is forced’. See Ibid., Bk 18 Ch 14-17 292-293. The exception was the people of Louisiana, ‘the Natchez’, who worshipped their leader as the brother of the sun. Without their superstitious belief they would have realized that their leader was ‘only a poor wretch like themselves’. Ibid., Ch 18 294. In any case, the idyllic side of American peoples was countered by a less positive account of their nature and mores. By nature they were cowards, Montesquieu affirmed. In addition, their actions and customs were respectively ‘atrocious’ and ‘barbaric’. Ibid., Bk 14 Ch 3 234-235. Besides, as a consequence of their systems of production and scattered lives there were no secure marital unions in American societies, and therefore its members mingled ‘indifferently like beasts’. Ibid., Bk 18 Ch 13 291. For all these reasons Montesquieu might have celebrated the formation of a great people in the woods of America. See infra footnote 111.
Montesquieu conceived ‘commercial society’ as the apex of social evolution. In fact, when he referred to the European colonies overseas he made a clear differentiation between landed and commercial empires.\textsuperscript{110} He was clearly anti-imperialist with regard to the former. However, he made a more nuanced and ambivalent evaluation of the latter. For example, although he acknowledged that trade restrictions imposed in the colonies were detrimental for the colonial population, he believed that the injury ‘was compensated by the protection of the mother country’\textsuperscript{111}

In Montesquieu’s view, England was an example of the establishment of colonies with the sole goal of fostering trade. Without explicitly mentioning England he clearly referred to it, affirming that ‘this nation’ in sending colonies abroad did so ‘to extend its commerce more than its domination’\textsuperscript{112}. Montesquieu believed that even in North America, where the English had displaced hunting peoples, colonization had created some general benefits. Concretely, the application of the metropolitan form of government in the American colonies had resulted in ‘the formation of great peoples, even in the forests to which it had sent its inhabitants’.\textsuperscript{113} Equating the territories of North America with forests, and thus wilderness, was a reinstatement of the way in which the puritans of New England conceived the alien environment of North America. In this case, Montesquieu believed that wilderness was conquered by the civilizing effect of government.

**Stadial theory: environmental implications**

In the mid-eighteenth century the embryonic ideas on the engines of historical progress of Grotius, Locke, and Pufendorf, and the more elaborate reflections of Montesquieu, crystallized in a more detailed stadial theory of social evolution that linked different systems of production to different stages of civilization.\textsuperscript{114} This more developed evolutionary theory recognized four progressive stages in the scale of global socio-economic development that were, from most primitive to most civilized: hunting-gathering, pastoral,
agricultural, and commercial societies. All societies could in principle climb up this progressive scale, on the condition that their main economic activity evolved accordingly.

Significantly, the universal laws of socio-economic progress corresponded and gave prominence to the economic practices that the Europeans normally associated with their own societies. As a result of this correlation, European economic institutions that facilitated environmental mastery and resource exploitation in different colonial settings, namely private property rights, plantations agriculture, and international trade, could easily be presented not only as more efficient than those of non-Europeans, but also as benchmarks of social progress.

Stadialism was not a monolithic theory. Despite the appeal of its implied evolutionary logic, the different phases of social change were not always presented as universal or inevitable. Besides, a number of Enlightenment intellectuals distinguished merely three periods of socio-economic evolution, excluding the commercial stage and placing agriculture at the top. In the same breath, others combined the agricultural and commercial stages of growth, and presented this fusion as the best way to bring about an affluent society.

The idea of social evolution based on successive modes of production was adopted by eminent intellectuals such as the physiocrats Anne-Robert-Jacques Turgot and François Quesnay, Jan-Jacques Rousseau (who inverted its terms), William Blackstone, Nicolas de Condorcet, and Johann Gottfried von Herder, among others. The Scottish Enlightenment contributed to the most elaborate formulation of the theory. Thinkers like Adam Ferguson, David Hume, and William Robertson adopted it in part because it allowed Scots to assert their Britishness, and thus their civility, in spite of their different ethnicity. The four-stage theory of history occupied a central place in the economic thought of Adam Smith. By reference to this model he managed to explain the transition from the simple local economy of the first human groups to the long-distance trade that characterized his more ‘globalized’ epoch. But, in reaction to physiocratic economic prescriptions, Smith cautioned against applying stadial theory as a

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115 Patrick Griffin, *American Leviathan: Empire, Nation, and Revolutionary Frontier* (New York, Hill and Wang, 2007) 29. The English colonization of Ireland and Scotland helped develop a social model for integrating different peoples that was then easily transplanted to the English American colonies. Ibid., 28-31.


118 Griffin, *American Leviathan*, 29. Fitzmaurice has underlined the emergence of commercial society in eighteenth century British political life and the challenge that it posed for Scottish philosophers. Their theories responded in part to the attempt to reconcile trade and private wealth with civic life and communal values. See Fitzmaurice, *Sovereignty*, 149-150.


120 Ibid., 102.
sound socio-economic policy guide for European development.121 Europe had historically developed in a ‘retrograde’ fashion, thus contravening the natural order of societal development.122

Another function of stadial theory was to provide an alternative explanation of the origins and development of private property to that offered by contemporary Scottish thinkers who, following Locke, used labor as the foundational source of private property.123 Smith realized that combining different stages of social development with a labor theory of property, as most Scottish intellectuals had done, was problematic. Although property in the first socio-economic stage was tantamount to physical possession, it became independent from it in subsequent phases. How could labor then explain the noticeable variation of power over the thing possessed that the institution of property conferred in each stage?

In the Lectures on Jurisprudence Smith solved this conundrum by pointing to the fact that the laws that governed the formation of property were different in different periods of human history.124 In the age of hunters ownership of wild animals ‘was conceived to begin as well as to end with possession’.125 So, a thing ceased to be mine once I ‘had lost the immediate property of it’.126 The transition from the hunting era to the stage of shepherds was ‘the greatest in the progression of society, for by it the notion of property’ was extended ‘beyond possession’.127 People agreed that the property of tamed animals was not lost when continuous possessions ended, as long as the animals continued to return to their owner.128 Private property on land appeared later than the introduction of agriculture, after the establishment of cities, when the ‘chief magistrate’ apportioned the land between the inhabitants of the community.129

There was a clear teleology in Smith’s historical periodization. The system of production, the development of laws and regulations to guarantee private property, and the form of government were tied together. In the words of Adam Smith: ‘The more improved any society is and the greater length the several means of supporting the inhabitants are carried, the greater will be the number of their laws and

121 Ibid., 102-103.
125 Ibid., (A) Vol I §41 18.
126 Ibid., 19.
127 Ibid., (A) Vol II §97 107.
128 Ibid., (A) vol I §46 20.
129 Ibid., §50-52, 22-23.
regulations necessary to maintain justice, and prevent infringements of the right to property.”

Accordingly, he affirmed that ‘among hunters there is no regular government; they live according to the laws of nature’.

Smith postulated the division of labor as the economic principle that guided historical progress. As he remarked in the introduction to An Inquiry into the Nature and Causes of the Wealth of Nations, the soil, climate, or extent of the territory of a particular nation were inconsequential with regard to its wealth. Prosperity was the result of the skillfulness with which labor was applied and the comparative number of useful and useless laborers. Therefore, savages, barbarous, and crude peoples lived precariously and were deprived the conveniences of life because they were ignorant of the contribution of the division of labor to the ‘progress of opulence’. In a comparison reminiscent of Locke, Smith placed ‘the meanest laborer in a polished society’ above ‘a savage’, based on the former’s superior material life.

Even before the Scottish Enlightenment, socio-evolutionary thinking had been used in English erudite circles. Since the conquest of Ireland, the English had constructed Irish ‘barbarism’ by reference to a standard of social differentiation. Later on, they applied a similar notion of ‘barbarism’ or ‘savagery’ to North American peoples. By the last decades of the eighteenth century the doctrine had spread beyond the English debate, becoming a fundamental element in the social thought of the European Enlightenment.

Stadialism created a strong link between social progress and the maximization of wealth. Stadial theory was the intellectual expression of the material affluence and human happiness that the global economy in formation seemed to offer to European societies. This represented a clear departure from the idea of utilizing nature in the Spanish scholastics. Spanish discussions of the importance of agriculture and

130 Ibid., §35 16.
131 Ibid., (B) §19 404.
132 Smith, An Inquiry, intro. §3 10.
134 Smith, Lectures, (B) §287 521. The same statement can be found in Smith, An Inquiry, intro. §4 10.
135 Oberg, Dominion, 19-22.
137 Ibid., 199-202.
138 Ibid. Despite the little appeal of old-fashion narratives of progress in recent post-modern times, it is still possible to find contemporary versions of the stadial theory. Bernstein, for instance, has divided the human history of economic development in four stages: hunter-gatherer, agricultural, industrial, and postindustrial. See William J. Bernstein, The Birth of Plenty: How the Prosperity of the Modern World was Created (New York, Mac-Graw Hill, 2004) 45-50. Similar to Enlightenment thinkers, he also considers property rights as one of the foundations of modern prosperity—the others being scientific rationalism, easy access to capital, and efficient transport and communication. See Ibid., 52.
private property merely revolved around the need for human preservation after the original sin. In contrast, Enlightenment writers provided detailed economic descriptions of the agricultural stage, related to plantations, single crops, and capital returns.

Similarly, they offered complex theories of trade, dealing with the role of merchants, investors, and charter companies. In this eighteenth century discourse all of these economic activities rested on the institution of private property. God as a mediator between humans and nature was gradually substituted by a direct desire to comprehend and modify nature that was to an important extent related to the comforts and luxuries that European environmental power in the colonies granted to European merchants, investors, companies, and societies at large. A theological legitimation of economic activities became less relevant in the context of an emerging global capitalist economy buttressed by a robust normative and institutional apparatus and a progressive philosophy of history that gave Europeans a novel certitude about their destiny as the world’s ‘improvers’.

While the four-stage theory of social evolution highlighted the link between civilization and different economic practices or types of production, the environmental implications of this connection remained largely unexamined.139 From an environmental perspective, we could say that there was a correlation between different forms of economic, social, and political organization and the capacity of different societies to control and transform their natural habitats. In other words—those of Wolloch—stadal theory postulated that ‘the mastery of nature and the rise of human societies had a long and intimately connected history’.140 Hunting-gathering, shepherding, cultivation, and commerce affected the environment rather differently, especially if the last two stages are considered in their capitalist versions. Moreover, the commercialization of all productive activities, due to the existence of international markets for colonial products, increased the demand to exploit nature. For example, the environmental destructiveness of North American hunting grew exponentially once it was oriented to satisfy the growing demand of European markets.141

139 For an exception see John M. Mackenzie, ‘Scots and the Environment of Empire’ in John M. Mackenzie and T. M. Devine (eds.), Scotland and the British Empire (Oxford, Oxford University Press, 2012) 147-175, 148. In a more general comment about the Enlightenment Mokyr has underlined the importance of looking at the period from an environmental perspective. Accordingly, ‘There can be no doubt that knowledge has been used to acquire power over others, and in that regard the age of Enlightenment was no different than the rest of human history. Where things were different was, above all, in the idea of useful knowledge which gave people power over nature and not (just) over other people. It is this kind of power that the entire historical literature inspired by Foucault’s approach to the Enlightenment studiously ignores, and yet it is at the core of what increasingly mattered in this period.’ See Joel Mokyr, The Enlightened Economy: Britain and the Industrial Revolution 1700-1850 (London, Penguin Books, 2009) 35.


141 See supra Chapter 1, pages 39-40 and 51.
As a result of the idea of social progress, transcontinental trade and commercial agriculture acquired a novel connotation in the law of nations. Besides contributing to the improvement of nature and the attainment of economic prosperity, they were also regarded as hallmarks of the good social life. The extent of human manipulation of the natural environment became part of a universal normative standard whereby all the world societies could be hierarchically ordered. Nature and progress were intimately connected by the belief that the more a particular society exploited its natural resources, the stronger was its legal claim for private property rights, the better its laws, and the more developed its socio-economic organization. Conversely, the lack of private property and capital-intensive economic activities were signs of backwardness.

In their accounts of human progress, Grotius, Locke, and Vattel had left North Americans’ potential for evolution unimpaired. Savagery was neither the consequence of their inherent natural deficiency nor the result of irresistible environmental constraints. According to Locke, Vattel, and Lafitau, savagery rather derived, to a certain extent, from North Americans’ indolence and the resulting failure to thoroughly modify their environment. In the sixteenth century the Spanish scholastic Domingo de Soto had claimed that there were still uncultivated lands due to human indolence. For subsequent authors, the peoples of North America were the paramount example of the lack of material comfort derived from sluggishness.

In most European intellectual reflections on social change in the seventeenth and eighteenth centuries, Europe and North America were respectively considered as the highest and lowest points of social evolution. Within this body of scholarship, North Americans’ stagnant social improvement hindered their recognition as rightful holders of property rights over their lands. But not every non-European territory

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142 ‘Plantation schemes in Ireland and the New World were built around plans for settled agriculture, market towns, and productive exchange, for example, lending weight to the claim that they were intended to bring civility to wilderness.’ See Michael J. Braddick, ‘Civility and Authority’ in Armitage & Brassick (eds.), The British Atlantic World, 93-112, 104.
143 See supra pages 224 and 230. In this regard, Fitzmaurice affirms that for Locke ‘the more intensively we labor on nature the more value we add to our property. Through this process one person and one society surpasses another in the degree to which the potential held in nature is released.’ See Fitzmaurice, Sovereignty, 117.
144 Soto, De iustitia, Book IV, 3.1, 298.
145 And hence it was common to compare American Indians with the ancient tribes of Germany, Rome, and Greece. See Harro Maximiliam Höpf, ‘From Savage to Scotsman: Conjectural History in the Scottish Enlightenment’ 17 Journal of British Studies (1978) 19-40, 25. The Enlightenment Scottish historian William Robertson had in mind the peoples of North America when he noted that: ‘The institutions suited to the ideas and exigencies of tribes, which subsist chiefly by fishing or hunting, and which have hardly formed a conception of any species of property, will be much more simple than those which must take place when the earth is cultivated with regular industry, and a right of property not only in productions, but in the soil itself, is completely ascertain.’ See William Robertson, The History of America, in three volumes, Vol. II (London, Printed for A. Strahan; T. Cadell, in the Strand; and J. Balfour, at Edinburgh, 1788) Vol II Bk IV 111. Adam Ferguson shared the view that those American nations that ‘intrust their subsistence chiefly on hunting, fishing, or the natural produce of the soil ... have little attention to property, and scarcely any beginnings of subordination or government’. For him ‘property’ was a
was equally categorized. There were relevant nuances and hierarchies outside European borders. The case of China is illustrative. Vattel, for instance, characterized China as ‘the best cultivated land in the world’. Wolff, whose high esteem for Chinese society is famous, believed as well that ‘from the most ancient times’, the Chinese had been ‘prominent among the more civilized nations’. The fact that Europeans regarded China as an agricultural and trading nation suggests that stadialism influenced the assessment of Chinese social standing. Not coincidentally, perhaps, China was running at the time toward an environmental crisis related to its accelerated expansion of agriculture and commerce.

Even in America, the commonwealths of the agricultural and commercial empires of Tawantinsuyu and Anahuac excelled, according to Vattel, all other pre-colonial societies, particularly those of North America. Distinguishing between the Spanish illegal conquest of great empires in Central and South America and the legitimacy of establishing colonies in the northern part of the continent, Vattel asserted: ‘Thus, while the conquest of the civilized empires of Peru and Mexico was a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them.’

It is remarkable that these pre-colonial American empires had the greatest environmental impact on the continent prior to the Europeans’ advent. The stereotypical depiction of North American peoples in legal and political European thought as non-agricultural or agriculturally deficient peoples was at odds with reality. Agriculture had been practiced in North America for several millennia already before Christ. Pre-colonial cultivation covered 50 percent of the dietary requirements of the population of the southern regions. Further north, 75 percent of the food needs of the Huron were met with products obtained from husbandry. Besides, the peoples of America contributed their knowledge to the

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146 Wolloch, ‘History and Nature’, 90.
147 Vattel, The Law of Nations, Bk I Ch VII §80 37.
148 Wolff, Jus Gentium, I, §54, 35.
149 For Voltaire land was fertilised when it was peopled, policed, and civilized, something that had happened in China when Europeans were still barbarians. See Wolloch, ‘History and Nature’, 90.
150 Richards, The Unending Frontier, 112-147.
152 Miller, An Environmental History.
154 Ibid., 30-31.
155 Ibid., 33. See also Wynn, Canada, 80.
agricultural practices of European settlers. They showed, for example, which seeds fitted better in particular kinds of soils.156

Furthermore, North Americans’ cultivation often enriched the diet of the new comers. In certain colonies like English Virginia, settlers were dependent on the pre-colonial population for supply of agricultural products.157 Similarly, in Jamestown and Plymouth they provided corn to English settlers, and taught them planting techniques which saved them from starvation.158 Besides, innumerable reports written by English colonists at the time acknowledged the presence of local agriculture.159 However, despite the pile of evidences to the contrary, Locke, Adam Smith, and several other Enlightenment intellectuals still categorized North Americans as an underdeveloped non-agricultural people.160

Locke, who according to Armitage had ‘a more thorough understanding of his country’s commerce and colonies than that possessed by any canonical figure in the history of political thought before Edmund Burke’, completely failed to realize the complexity of North Americans’ productive systems.161 Another case in point is Adam Smith, who gave an inaccurate reading of his own sources of ethnographic observations about North American societies. In order to construct an age of hunters characterized by scarcity and lack of resources he had to omit contemporary references that pointed to the fact that gathering and agriculture covered half of the diet requirements of most North American societies.162

Actually, Locke and Smith’s conclusions about North Americans’ lack of mastery over nature and backwardness contradicted one another. If North Americans’ primitiveness derived from their indolence, as Locke had postulated, how was it possible that according to Smith their survival was at stake due to

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156 Hurt, Indian Agriculture, 41. Similarly, Petulla defends that in most colonies ‘... it was Indian helpfulness which carried the first settlers through their initial decades on the land. Indians taught the neophytes to hunt, gather, fish; to plant maize, pumpkins, sweet potatoes, beans, and squash; and to fertilize with fish and seaweed.’ See Petulla, American Environmental History, 17.


158 Banner, How the Indians Lost Their Lands, 19.

159 Ibid.

160 Smith for example argued that although it was true that North American ‘women plant a few stalks of Indian corn at the back of their huts’, that activity could ‘hardly be called agriculture’. Smith, Lectures, Lectures (A) Vol I §29 15. A similar statement can be found in Ibid., Lectures (B) Part I §150 459.

161 A plausible explanation of this paradox could be that although Locke knew that North Americans ‘women plant a few stalks of Indian corn at the back of their huts’, that activity could ‘hardly be called agriculture’. Smith, Lectures, Lectures (A) Vol I §29 15. A similar statement can be found in Ibid., Lectures (B) Part I §150 459.

162 See Marouby, ‘Adam Smith’, 94-95. Interestingly Marouby has explored the ‘gender bias’ that made Smith dismiss productive activities mostly undertaken by women.
their limited productive capacity? Indolence was the result of abundance rather than scarcity. North Americans’ leisure was predicated on their capacity to easily produce from nature what was required to subsist. But if the original condition of humankind (that in which Smith had situated the peoples of North American) was characterized by material ease and leisure rather than privation and hard work, there was then no compelling motivation to ‘ascend’ through the historical stages that Smith had proposed as steps toward progress.163

Apart from a wide variety of agricultural practices, the peoples of North America managed their landscapes in complex ways that did not easily fit the image of savages unacquainted with their natural habitats. In fact, their detailed knowledge of soils, fauna, and flora allowed them to manipulate and improve their surroundings in order to foster their productive potential.164 Women studied and selected varieties of plants based on their nutritional and medical properties.165 North American peoples prospered thanks to their ability to use a diverse array of fauna and flora such as maple groves, berry patches, fishing spots, clam and oyster beds, hunting sites, and many other natural resources.166 Yet these practices and knowledge were either invisible to or devalued in European legal and political thinking. As colonization progressed and epidemics made their inroads, North Americans slowly lost territory. As a result, their more sustainable environmental practices were increasingly marginalized in the emergent colonial economy, which eventually became predominantly oriented to the demands of international markets. Gathering, hunting for self-consumption, and so-called ‘rudimentary’ forms of agriculture were, in the eyes of European settlers, relics of the past that impeded environmental mastery and stood in the way of progress.167

The attempt by European colonists to introduce in North America the productive activities and legal institutions that characterized the most advanced social stages—namely, the agricultural and commercial stage—is not per se enough to explain the environmental destructiveness of European colonization. After all, the systems of production that were used as criteria to order societies—gathering, hunting, agriculture, and trade—formed part of North American economic structures before the colonialists ever set foot in the continent. Moreover, those activities, practiced since immemorial time, had contributed to

163 Ibid., 95-97.
165 Anderson, Tending the Wild, 5.
166 Cronon, Changes, 63-65.
alter North American nature considerably (and not always sustainably) before European arrival. Therefore, their sponsorship by the European colonists, buttressed by the law of nations, did not necessarily have to produce a sharp break in terms of the utilization of natural resources. So part of the explanation for the introduction of a more destructive approach toward nature has to be found in the different conceptions that informed European and North American practices.

North Americans’ property systems are indicative of the extent to which the institutions of Europeans and North American peoples differed. In North America, productive activities were primarily oriented to satisfy the needs of the collective. The lack of incentive for individual accumulation of wealth helped preserve nature’s regenerative capacity. This social goal, however, did not mean that the land was either vacant or always held in common. In fact, activities such as hunting and gathering involved some sort of land tenure. Moreover, often families and individuals possessed exclusive rights to cultivate particular plots of land given to them by the group’s leaders so that they benefited from their exploitation. However, because the land belonged to the whole community, an exclusive right of use did not amount to permanent individual ownership. Moreover, the main criterion to allocate land was the needs of families and individuals. Besides, permanent land ownership and property rights over natural resources were not of much value for individuals and groups that were in constant movement. Everything that could be possessed became a burden once the group decided to relocate.

North Americans’ change of habitat provided nature enough time to recover. This practice was not the result of a strict conservationist attitude. When the supply of natural resources of a certain area decreased, North Americans migrated to another region that could better satisfy their needs. Maximization of benefit and environmental regeneration were two sides of a single sustainable process of relocation. It was North American peoples’ generally sustainable way of living rather than their inherent attempt to preserve nature that prevented a total commodification of ecosystems in North America. In the itinerant life of most North American peoples there was always a strong link between the use of their surroundings and the impact of that use on their lives. If consumption went beyond nature’s capacity of regeneration, future

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168 Property rights were connected to landscapes. As Tully claims: ‘… property rights and duties inherent in the clans and families and apply to forms of activity and to the geographical territories or ecosystems in which the activities take place, not to the products of the activities, as in Locke’s account.’ See Tully, ‘Aboriginal Property’ in Armitage, Theories, 356.

169 Greer, ‘Commons and Enclosure’, 371.

170 Banner, How the Indians Lost Their Lands, 57. See also Greer, ‘Commons and Enclosure’, 369.

171 Hurt, Indian Agriculture, 66.


173 Banner, How the Indians Lost Their Lands, 58.
subsistence became compromised. Europeans interpreted that ‘positive dependency’ on nature as a weakness that evidenced the cultural inferiority of North Americans.

In Europe, the consumption of products coming from North America was assured no matter how North American nature was thereby degraded by the economic activities needed to extract or produce those commodities. The environmental impact of North American peoples was geographically constrained to the territories that a particular society occupied and used. Once European colonialism ensued that scenario radically changed. As a result of long-distance trade the limits of European consumption and environmental exploitation were stretched to the apparently inexhaustible non-European natural frontiers opened by colonization. As long as new territories could be occupied, and their inhabitants easily displaced, controlled, or subjugated, the accumulation of material wealth could continue unabated. By seizing enormous tracts of non-European nature Europeans became less ‘dependent’ on the environment than the peoples of North America. This kind of environmental power, which found legal reflection and protection in the law of nations, reinforced their conviction in the superiority of European economic institutions and social arrangements. However, transforming wilderness into cultivated and civilized landscapes was an arduous enterprise. The coupling of this enterprise with personal wealth produced an irresistible force deployed toward the control and exploitation of nature that in the long run was to have dire consequences for non-European ecosystems and the social fabric of pre-colonial polities.

Concluding remarks

The impact of the law of nations on nature during the seventeenth and eighteenth centuries was significant both from a material and a conceptual point of view. The effect of this power was especially notorious in North America, where the Dutch for a limited number of years and the British for more than a century exercised territorial control.\textsuperscript{174}

The role that nature played in the political economy of colonialism—a commoditized realm open to exploitation—was cloaked by legal and political discourses that claimed precisely the contrary: that prosperity and progress were inextricably tied to European colonists’ privatization, commodification, and improvement of colonial natural resources. European environmental hegemony, in contrast to the alleged environmental dependency of North America peoples (which indicated their incapability to

\textsuperscript{174} The French, too, established colonies in North America. French imperialism is, however, outside the scope of the present work.
manage and dominate their surroundings), reinforced the conviction that only European colonial rule could help non-European societies abandon their backward lifestyles and move toward a better and richer life. That conviction legitimized further exploitation of non-European nature.

Importantly, it does not follow from the above historical analysis that neither the theories of European scholars nor the practices of colonists purposely sought to destroy nature. On the contrary, both conceived its modification in what for them were obviously positive terms. According to their worldview, a humanized habitat seemed naturally preferable to wilderness. It was precisely the powerful idea of improvement and progress—projected to the control and intensive utilization of the environmental realm—and the correlation of that idea to the normative universalization of capitalist forms of production—linked to dreams of material affluence derived from the colonies—that precisely blinded Europeans to the adverse social and environmental consequences of their doctrines and actions. Backward peoples and wild nature seemed amenable at best, and utterly disposable at worst.

European ideas and legal institutions had particular influence on the fate of North American ecosystems and peoples. The fact that agriculture was used as the exclusive legal criterion to claim land ownership at the beginning of North American colonization meant that, at least in theory, North Americans could not keep possession of the territories in which, for centuries, they had hunted, fished or gathered fruits—all vital activities for their survival.175 In northern North America, where agriculture was not intensively practiced, North Americans’ lands and resources enjoyed no legal protection against the colonists’ acquisitiveness.176 Even when purchase eventually became the legal basis for the acquisition of North Americans’ land, their alleged culturally inferiority legitimized abusive transactions that were otherwise uncommon among English colonists who generally treated one another as equals.

Apart from material dispossession, colonization worked on a subtler discursive level, creating a psychological impact on colonized populations. Redefining the good life in the economic and environmental terms that befitted the colonizers and their institutions limited the space for the expression and realization of North Americans’ identity and worldviews. Eventually, displaced to the margins of the new society in construction, North Americans agonized to redefine their new position. Entering civility not only entailed a simple change of behavior, but the acceptance of a total reconfiguration of what society and nature had previously meant to North America’s myriad societies.

175 See Cronon, Changes, 63.
176 Ibid.
The imposition of European mores and standards through universal legal standards mainly pushed North Americans in two different directions, while also leaving certain space for maneuvering between those positions. Mainly, but not exclusively, North Americans tried to keep and protect their habitats, institutions, traditions, and systems of production. Alternatively, they imitated European colonialists, and struggled to adapt to a new lifestyle, entering colonial life and accepting the alien economic institutions and social arrangements that came with it.

The first option led to a life of resistance, retreat, and negotiation, in which more often than not the North Americans were dispossessed of their lands and decimated, the survivors becoming strangers in their own homelands.\textsuperscript{177} The second option was at best rewarded with the enjoyment of European status and property rights over the natural resources that they had previously controlled. However, often the price of voluntary assimilation was considerable,\textsuperscript{178} as the mirror of the colonizer produced a distorted image of those who dared to search in it for their own reflection. Apparently at hand, the model receded as it was approached.\textsuperscript{179}

For most of the eighteenth century, nonetheless, North Americans’ societies were strong enough to limit the English to a section of land on the Eastern cost of the continent. This way, the environmental and social impact of European colonists was territorially limited. Moreover, before the Industrial Revolution the environmental impact of settler colonialism on non-European ecosystems was also somewhat restricted. However, in the nineteenth century, the independence and expansion of the U.S. and its industrialization had an adverse effect on North American societies and their ecosystems, one that was forever going to transform the environmental and social configuration of the continent. A similar

\textsuperscript{178} For Oberg, the consequence of the imposition of English civility was the erosion of North Americans’ religions and cultures. See Oberg, \textit{Dominion}.
\textsuperscript{179} Most North American societies were eventually divided between advocates of acculturation and resistance. See Ronald Wright, \textit{Stolen Continents: 500 Years of Conquest and Resistance in the Americas} (Boston, Houghton Mifflin Company, 1992) 200-238. As in the case of the Creek Nation, at times animosity ‘between wealthy progressives and militant anti-acculturation’ became so intense that it degenerated into open civil war. Ibid., 211. The imposition of the colonists’ culture in North America took several centuries. In fact, in the seventeenth centuries North Americans had ample space for manoeuvre. The fact that most of the land was bought, granting the possibility of alliances with certain European nations against other nations and rival groups, gave North Americans considerable bargaining power. So, at that time, there was neither accommodation nor resistance, but incorporation. See Kathleen DuVal, \textit{The Native Ground: Indians and Colonists in the Heart of the Continent} (Philadelphia, University of Pennsylvania Press, 2006). However, from the independence of the United States of America, control over most of what is today the U.S. drastically reduced North Americans’ capacity to prosper in the new colonial context. Even so, many North American groups bravely resisted assimilation for decades, and found a middle way that allowed them to retain their culture while apparently integrating into the new society, a struggle that continues even at present. See Mary Beth Norton et al., \textit{A Peoples and a Nation: A History of the United States} (Boston, Houghton Mifflin, 2005) 123. Finally, some groups like the Comanche even progressed, creating a powerful empire in the eighteenth and early nineteenth century. See Hämäläinen, \textit{Comanche Empire}. 

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pattern of social and environmental devastation took place in Australia, where the British pushed the pre-colonial population of this huge land mass to territorial marginality and the brink of extinction. This is the story that will be the focus of our attention in Part IV.
Part IV

INTERNATIONAL LAW AND SETTLER COLONIALISM:
SAVAGES, STADIAL THEORY, AND OCCUPATION (1800-1850)

When the history of nineteenth-century international law is narrated, the link is often emphasized between the Institut de droit international and the phenomenon of European imperialism, most clearly articulated in the context of the ‘Scramble for Africa’. This connection, important as it is, reveals only part of a larger story. Before imperial powers extended their sway over most of Africa and Asia during the last quarter of the nineteenth century, the British and the U.S. had already made enormous territorial acquisitions from 1800 to 1850. While the British Empire extended its sway to Australia, New Zealand, the Cape of Good Hope, and Colonial British North America, the U.S. expanded to the West of North America. So from the beginning of the century there was a compelling need to legitimize European colonialism. International law did precisely that, justifying the colonial acquisition and exploitation of these enormous extensions of territory and their myriad ecosystems.

The classical way in which the history of international law in the nineteenth century has been written is incomplete in yet another way. As the common narrative goes, during the nineteenth century the legal justification of empire was largely articulated through the vocabulary of civilization. The civilizing mission, the standard of civilization, and the distinction between civilized and uncivilized were all deployed in order to control, govern, and reshape non-Europeans. This account is actually true, even though the contours of the legal meaning and use of these concepts are still debated. But the project of civilization only reveals one side of the coin. Civilization was an ideological construct, an archetype to reform and refashion wanting individuals, groups, and nations. But when Western philosophers, policy makers, and legal commentators discussed the legitimacy of the acquisition of territory from 1800 to

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1 See Koskenniemi, The Gentle Civilizer, 98-178.
2 The time, framework adopted in this chapter is highly artificial. Settler colonialism lasted longer than 50 years, and this chapter reflects this fact, including works and authors that spill over this period. However, I have decided to limit the inquiry temporarily in this sense, as this amount of time was fundamental in the formation of the legal phenomena that I analyze. It also offers a good perspective of the discourses and practices related to this colonial phenomenon.
1850, they often made use of another equally compelling cosmopolitan vocabulary that gravitated around the idea of improvement.  

During the first half of the nineteenth century, the improvement of vacant, unexploited, and unoccupied lands was the main rationale for settling vast regions of the world. Settler colonialism was animated by the prospect of transforming wild areas into a replica—albeit not identical—of the metropolis. Through their legal craft, international lawyers resorted to a number of legal theories, namely discovery and occupation, in order to validate that progressive vision. This was not a novel course of action. After all, the British had already established settler colonies in North America during the seventeenth and eighteenth century, so there were a bunch of legal doctrines at hand that were applicable to the new colonial scenario. Besides, the British were well versed in the vocabulary of improvement.

Civilization and improvement did not function as antagonist or alternative vocabularies. In fact, they coexisted and reinforced one another. In the eighteenth century there was already a long tradition of conceiving social change in progressive terms. During the Enlightenment, conjectural history explained the advancement of societies through a progressive philosophy of history based primarily on the amelioration of productive practices. As nations adopted agriculture and specialized in trade and manufactures, law and government appeared. Following these developments, all areas of human life improved. This progressive betterment of human capabilities and the standard of living found expression under the generic banner of civilization.

In the nineteenth century, James Mill and John Stuart Mill mixed the conceptual worlds of improvement and civilization to explain how society was evolving. They retained the Enlightenment belief in historical progress through successive stages of economic growth linked mainly—though not exclusively—to a society’s ability to exploit their surroundings. But the transformations witnessed at the beginning of the nineteenth century were of a rather different nature. Social change had acquired an entirely new dimension when compared to previous epochs. Capital fostered science and technology, which in turn created new ways of altering nature to an extent that was unimaginable before. The path that human progress was following in the nineteenth century required a new conceptual framework, the explanatory character of which was applicable to the whole world.

When nineteenth-century intellectuals contemplated the world around them, they realized that the social gap that separated the most advanced European societies from the most backward ones had greatly increased and continued to expand. The progressive character of the avant-garde Western nations (as the

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4 The importance of the idea of improvement in settler societies is underlined in Weaver, The Great Land Rush.
U.S. entered the selective European club) was never questioned, but the nature of that progress had clearly changed. While social progress was previously interpreted by reference to superior economic practices or better government, it now seemed to be all encompassing. Those European nations that had embraced the Industrial Revolution were advancing on every front. Government, laws, institutions, machines, knowledge, religion, morals, and all the other elements that distinguished their particular culture were indisputably superior to those of any other nation or community. What is more, that grandeur was considerably greater than ever before. The term ‘civilization’ conveyed the unique way in which Europe was changing and the corresponding superior plane from which European nations now related to other social formations.

Industrialization and the social changes that it set in motion complicated classical stadial theory. But it did not make it completely obsolete. While losing some of its explanatory character, conjectural history retained part of its appeal. Several non-European nations, whose economy was based on trade and cultivation—the activities that corresponded to the higher social states of the stadial ladder of progress—looked from the new prism of industrialized Europe as backward as those societies that hunted. Compared to Europe they were all uncivilized. This did not mean, however, that there was no difference among the general category of uncivilized non-European peoples. In territorial terms, for instance, it was not inconsequential whether nations or mere groups of savages held land. This is why most international lawyers retained the stadial terminology to designate societies of hunter-gatherers, and mixed it with the word ‘civilization’. Both could now function together.

From 1800 to 1850, as in previous colonial periods, the rationale for settler colonialism derived in part from the idea of improving nature through what I have call a standard of environmental exploitation. In fact, one of the elements of the program to civilize non-Europeans consisted in transforming their productive activities. In other words, non-Europeans acquired civilization once they were taught how to improve the wilderness that encircled them. But, powerful as the idea of transforming wilderness into productive fields was in the abstract, it still faced a major practical challenge. How could the British or the U.S. justify the establishment of colonies and settlements in territories which were already inhabited by non-European peoples? In the nineteenth century, many commentators skipped answering this

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5 For most international lawyers, savages did not constitute nations. So, they often referred to them as wandering tribes, savage tribes, hordes, or just savages. But there were exceptions. Ward and Polson talked about savage nations. For Ward’s remarks see infra Chapter 6, footnote 305. Polson uses the term ‘savage nations’ in Archer Polson, Principles of the Law of Nations, with Practical Notes and Supplementary Essays on the law of Blockade and on Contraband of War (Philadelphia, T. & J. W. Johnson, 1853) Sect. IV §VI 22.
question by merely denying that those territories were inhabited in the first place. But most scholars recognized that savages still roamed over vast unoccupied regions of the world. As the Industrial Revolution elevated the standard of living of Western masses, and particularly of wealthy colonial elites, the exploitation of the natural resources contained in those wild areas represented the tangible promise of unlimited human progress.

The story of international law and European imperialism during the first half of the nineteenth century is then partly the story of the answer given to the question of what to do with the savages. It was in this context that stadial theory and the agricultural argument remained relevant. In the settler colonies particularly, they retained their explanatory character and provided a legal mechanism to open new avenues for progress. Concretely, they were extremely useful to justify the occupation of the land of savages, as well as the exploitation of the natural wealth that it contained. The U.S. expansion into the Western part of the continent and the British colonization of Australia were the perfect scenarios to test those doctrines and give a definite answer to the legal question of occupation.
It has been recently claimed that there was a break between the way in which non-European societies were perceived in the eighteenth century and their characterization in nineteenth-century social theory. James Mill and John Stuart Mill were paradigmatic of that change. Allegedly, they reduced the pluralistic account of non-European societies that was characteristic of the type of philosophy of history developed by the Scottish Enlightenment to a rough dichotomy between savage and civilized. In doing so, they purportedly parted ways with authors that wrote in the tradition of stadial theory.

It is true that during the first half of the nineteenth century James and John Stuart Mill underlined the deficiencies of previous historical analyses of social development. They contended that the fact that some non-European societies had reached the stage that according to standard stadial theory characterized an agricultural or commercial society did not necessarily mean that they had attained a high degree of civilization. The merits and attainments of non-European societies needed to be re-evaluated. This reevaluation was vital for sound imperial administration.

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3 See Jennifer Pitts, A Turn to Empire: The Rise of Imperial Liberalism in Britain and France (Princeton, Princeton University Press, 2005) 127-131, 133. Mantena does not go that far in her claim. She rightly observes that they used stadial categories more loosely than previous authors. Ibid., 59.
There were further reasons that called for a reassessment of stadial theory. The material gap between the world's societies had grown to novel, wider proportions. Compared to industrial Europe even the most materially advanced non-European polity seemed lacking far behind. There was a clear-cut line that separated stationary non-European societies from the most progressive European nations. Through this prism, the world could be clearly divided in two. Besides, the civilizational level of a given society could not be derived from a mere analysis of its productive forces, as was the case with conjectural history, but instead demanded a thorough assessment of all aspects of that society.

But despite differences between conjectural history and the philosophy of history of James Mill and his son John Stuart Mill, their theories resembled in important ways those of the Scottish Enlightenment. Like the latter, they subscribed to a vision of socio-economic advancement through four phases, defined by the productive forces and the degree of control over the environment of a particular society. But for the Mills a high stage of economic advancement did not necessarily coincide with the upper end of the scale of social progress. This was the point in which they parted ways with classical stadial theory. A certain degree of material complexity was necessary for attaining the superior end of moral progress, but the achievement of the former did not necessarily guarantee the attainment of the latter. In fact, as John Stuart continuously reminded his audience, without the right policies to correct the economic growth that resulted from industrialization, the avid pursuit of wealth could certainly turn into a stumbling block for human improvement. Sound legal and political prescriptions recommended by enlightened intellectuals were vital for harnessing the potential of industrial society.

Outside Europe, there was no industrialization, so things were different. After assessing the world with their new civilizational lens, the judgment they passed was rather gloomy. Aside from a handful of European civilized societies that enjoyed continuous progress, all other human communities had either become stagnant or remained in a backward state of savagery/barbarism/primitivism (terms that they used interchangeably).

The latter group inhabited a non-political space outside history. They lived in a mere physical realm integrated by vast territories and pristine ecosystems that had yet to be exploited, its population being incapable and/or unwilling (idleness often stood in the way of industriousness) to do so. In spite of this general state, non-European societies were not uniform. At the lowest end of the human social spectrum

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were savages, who lived in ‘a condition very little above the highest of the beasts’. Civilization and savagery were the beginning and end of human progress. Accepting these premises, the Mills were convinced that by benevolent imperial rule and the exploitation of the territories populated by savages, European industrial societies disseminated the light of progress into the world.

These ideas also found reflection in the legal doctrine of occupation. Through their reflections on occupation, the international legal jurists of the period continued developing the legal vocabulary that paved the way for settler societies’ displacement of non-European ‘savages’. In those theories, the material and the legal dimensions of the appropriation of non-European ecosystems were fused. Private property and trade were part of a progressive philosophy of history that justified the taking of supposedly vacant land and natural resources in order to fuel the growing capitalist global economy, which informed the legal doctrines of the period. The mixture between stadial theory and occupation (often as an agricultural argument) created a standard of environmental exploitation that, according to most legal commentators, savages and their backward forms of production were unable to meet.

James Mill, stadial theory, and India

James Mill (1773-1836) was born in the Parish of Logie Pert in Scotland on April 6 1773. His father (also named James Mill) was a shoemaker and his mother Isabel Fenton, daughter of a farmer, had worked as a servant in Edinburgh. James’ mother was optimistic for her son. She wanted him to reach the dignity and stature that she never got. In order to foster his education, she kept him apart from playing with other children and from work assignments either at his father’s shop or at home.

Mill showed an early academic talent at the parish school. In 1790, he moved to Edinburgh where he pursued university studies and study for the ministry. After finishing his studies and being ordained, he moved to London in 1802, with the need to make a living as ‘a man of letters’ and the ambition to participate in politics. Once in London, he did not follow his previous religious vocation, turning instead

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8 Ibid.
10 Ibid.
toward a secular career. In 1808 he met Jeremy Bentham (an event that transformed his life), becoming his most devoted disciple and ‘converting’ to Utilitarianism. He occupied a prominent place in the circle of radical philosophical intellectuals gathered around Bentham. It was at this time that he definitively distanced himself from his religious affiliation and became openly critical of the religious establishment. In this, he was an example of the growing space for secular thinking within the English society.¹²

During his first decade of life in London, necessity pushed Mill to write incessantly, producing scores of articles, reviews, and editorials. His prolific pen also produced various books. In 1818, the publication of his mammoth History of British India gave him notoriety and the possibility of being appointed Assistant Examiner of the East Indian Company (EIC).¹³ From this first position, he gradually advanced within the Indian House until becoming Chief Examiner in 1830.¹⁴ The last part of Mill’s life was largely devoted to one of his most important projects: the education of his son John Stuart. During the last years of his life his health rapidly deteriorated. He died in London on 23 June 1836.

The History of British India and his service to the EIC has afforded Mill the reputation of being an advocate of British imperialism and influencing colonial administration.¹⁵ His History was compulsory reading for officials of the EIC and the top ranks of the Indian Civil Service.¹⁶ In addition to this direct influence, James Mill has been defined as a pivotal figure in the intellectual shift that, at the beginning of the nineteenth century, inaugurated a harsher view of and detrimental approach toward non-European peoples.¹⁷

Notwithstanding Mill’s direct and indirect ideological contribution to the legitimation of British rule, it is worth underlying the ‘altruistic’ nature of his justification of Empire. He was convinced that British India was a burden rather than a gift. Its administration did not report any benefit to the mother country.

¹³ Ball, James Mill, xvi.
¹⁴ Bower, Hartley and James Mill, 21.
¹⁵ See, for instance, Uday Singh Mehta, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought (Chicago, The University of Chicago Press, 1999) 77-97. See also Pitts, A Turn to Empire, 123-133.
¹⁷ Duncan Bell, ‘Empire and International Relations in Victorian Political Thought’ 49 The Historical Journal (2006) 281-298, 284. Notwithstanding this characterization, Bell, against Mehta, believes that Mill cannot be taken as representative of the whole spectrum of views (including anti-imperialist ideas) that formed within nineteenth-century British liberalism. Ibid., 284-289.
His economic analysis proved that colonies drained necessary labor and resources from the metropolis. Inter-colonial rivalry was also a recurrent reason to take arms against antagonist nations. Despite the obvious and multiple disadvantages of having colonies, Mill believed that governing India was still indispensable as part of the British universal task of spreading civilization worldwide. The duty of bringing progress to the world’s backward societies was a service to humanity.

The cosmopolitan tone of Mill’s reflections on empire was noted by his son John Stuart Mill, who praised his father’s ‘ardour for the improvement of mankind and of human life’. The goal of transforming humanity entailed two distinctive tasks, namely ‘the direct improvement of their beliefs and sentiments’ and the removal ‘of the various influences which he regarded as obstacles to their progress’. These intertwined goals guided his historical evaluation of Indian society. The herculean undertaking of enlightening humankind was entrusted to utilitarian reason. Human reason oriented toward utility and the maximization of happiness served as the lighthouse of humanity.

The thought of James Mill was influenced by Scottish conjectural history. He showed great appreciation and even enthusiasm for the lectures he received in Glasgow from Dugald Stewart. Besides, he was well acquainted with the works of Scottish philosophical historians and their stadial conception of history. Actually, he used those works in his writings in The Literary Journal, The Edinburgh Review, The Monthly Review, and The Eclectic Review among others. In The History he cited Adam Ferguson’s An Essay on the History of Civil Society and The History of the Origin and Termination of the Roman Republic, John Millar’s The Origin of the Distinction of Ranks and An Historical View of the English Government, William Robertson's The History of America, The History of Scotland, and An Historical Disquisition Concerning the Knowledge the Ancients Had on India.
and Adam Smith’s *An Inquiry into the Nature and Causes of the Wealth of Nations* \(^{31}\) and *Essays on Philosophical Subjects*. \(^{32}\)

In the second volume of the *History* Mill noted the importance of John Millar in the elucidation of the ‘different stages of social progress’. \(^{33}\) According to Mill, his writings were ‘almost the only source from which even the sightless information on the subject can be drawn’. \(^{34}\) He also lamented that, in spite of the importance of philosophical history, ‘little had been attempted in this great department’. \(^{35}\) In his opinion, after the publication of Millar’s *The Origin of the Distinction of Ranks*, the writing of conjectural history had come to a halt. \(^{36}\)

James Mill regarded himself as an heir of the Scottish tradition and hoped to make a contribution to philosophical history. In 1818, after having finished *The History*, he envisaged a new work on the history of English law in which he planned to explore ‘the expedients of the several ages to the state of the human mind, and the circumstances of society on those ages, and to show their concord or discord with the standard of perfection’. \(^{37}\) He never completed such a project. But this does not mean that he failed to make any contribution to conjectural history. He had already written *The History* with an eye on the possibility of enriching the investigation into the laws of social progress. \(^{38}\) In fact, he claimed that by identifying the ‘state of society’ that corresponded to the leading nations of Asia he had accomplished something that nobody had done before. \(^{39}\) For the first time, the Hindus, the Persians, the Arabians, the Turks, and the Chinese could be accurately ranked in a scale of social progress.

Did Mill continue the kind of conjectural history characteristic of the Scottish Enlightenment? His *History* clearly belonged to the historical genre cultivated by his admired Scottish predecessors. He similarly ranked non-European societies on a scale of social progress that crowned Europe as the apex of social sophistication. However, a difference of perspective and objective separates Mill’s theories from those of his precursors. Scottish authors like Adam Smith had attempted to identify the universal laws of economic and social advancement. They might have wished that their findings could influence the

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\(^{31}\) Ibid., Vol I Bk I Ch V 111.

\(^{32}\) Ibid., Vol II Bk II Ch IX 90, 92,108; Vol II Bk II Ch X 205.

\(^{33}\) Ibid., Vol II Bk II Ch X 138.

\(^{34}\) Ibid., 139.

\(^{35}\) Ibid.

\(^{36}\) Ibid.


\(^{38}\) Mill, *The History*, Vol II Bk II Ch X 139.

\(^{39}\) Ibid.
economic policies of different nations—chiefly those of England—but that was not the sole or even the main orientation of their works.

The classical four-stage theory of social development was also used as a lens to look at and reform the world outside Europe, in particular North America. But the recipe for the improvement of North America was casted in simple economic terms: introducing plantation agriculture and trade. Other social changes were naturally expected to follow from economic reform. Scottish conjectural history was not specifically conceived to serve as a guide for colonial administration. Mill’s inquiry into the state of society of Asian nations and particularly India had more direct imperial connotations, reaching widely and deeply into the texture of Indian society.

At the time that Mill wrote *The History*, Great Britain was in charge of administrating and governing Hindu society. Consequently, ascertaining ‘the true state of the Hindus in the scale of civilization’ had for Mill ‘the highest practical importance’.\(^{40}\) He contended that ‘[n]o scheme of government can happily conduce to the ends of government, unless it is adapted to the state of the people for whose use it is’.\(^{41}\) Then he dispelled the implications of this hypothetical mismatch in the case of India. If the British had ‘conceived the Hindus to be a people of high civiliza tion, while they have in reality made but a few of the early steps in the progress to civilization, it is impossible that in many of the measures pursued for the government of that people, the mark aimed at should not have been wrong’\(^{42}\).

Mill’s *History* consisted partly on an extensive analysis of all details of Hindu society and an evaluation of the place it occupied in the scale of human civilization. In this regard, he found that there was a mismatch between the high esteem in which most of his contemporaries held India and its actual backwardness. The same applied to other Asian nations like China. His *History* provided a derogatory reassessment of the Hindu nation and Asian societies in general, a re-characterization he believed was a precondition for the design of sound imperial government.

It has been contended that in addition to the explicit imperialist orientation of Mill’s conjectural history, his use of stadial theory differed also from the progressive philosophy of history of the Scottish Enlightenment in that he ‘reduced the comparatively subtle developmental gradations posited by the Scottish historians into a crude dichotomy between civilization and rudeness’\(^{43}\).

\(^{40}\) Ibid.

\(^{41}\) Ibid., 135.

\(^{42}\) Ibid.

\(^{43}\) Pitts, *A Turn to Empire*, 127.
It is true that Mill's idiosyncratic version of the evolutionary social categories of his Scottish forerunners transformed the civilizational gap that separated Europe and the wider world into a deep chasm. It is also far from contentious that the fact that Mill, unlike previous Scottish philosophical historians, continuously referred to the mental deficiency of ‘rude’ peoples as a proof of their backwardness contributed to the deepening of that gap. But there is more complexity in the way he introduced these significant differences and reshaped conjectural history than has been recognized.

Mill believed that his contemporaries’ admiration for Indian society was overrated. The ‘Scottish orientalists’ had no doubt in the superiority of the most advanced European nations over India, but they still praised several aspects of Chinese and Indian societies. They found exemplary traits in these societies that deserved consideration. For this reason, Mill took special issue with Sir William Jones, who despite his intellectual capacity and committed search for truth had misguidedly ascribed a high degree of civilization not only to the Hindu nation but also to other important Asian nations. This shortcoming was, in part, a consequence of erroneous observations and analysis. It was also the result of the straightforward application of a standard of civilization 'attached to no definite assemblage of ideas'.

Mill acknowledged the difficulty of correctly ascertaining the features that characterized the different phases of social evolution. It was not possible to reach a final conclusion on the civilization of any particular people by merely looking at one or two elements of their social fabric. This was precisely the shortcoming of the classical four stage theory of social development, according to which material factors and, particularly, a society’s way of production explained the transition from the lowest to the highest social forms. According to Mill, the evaluation of social advancement based on just one factor (no matter how important that factor was) was incomplete. Furthermore, it could lead to the misguided conclusion that two nations had the same level of civilization whereas in reality they belonged to very different stages of social progress. He believed that this kind of flawed and unreliable assessment had been made in the case of India.

Despite the fact that Mill found the four-stage theory of social development to be somewhat lacking in explanatory character, he did not reject it entirely. In fact, in volume one of The History he presents a

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47 Ibid.
48 Ibid.
49 Ibid., 138-139.
50 Ibid., 139.
pretty standard description of the stages of social change through which humanity had passed. In the ‘origin of mankind’, he explained, the world was ‘inhabited by a very small number of people’.\footnote{Ibid., Vol I Book II Ch I 148.} Life was precarious. There was no division of labor, no law, no government.\footnote{Ibid.} Men were ‘ignorant and unrefined’, a consequence of a lack of time for the cultivation of knowledge.\footnote{Ibid.} In the parts of the world where the first humans found thick forests they were ‘reduced to all the hardships of the hunter’s life’ and became ‘savages’.\footnote{Ibid., 150.} Contrastingly, in the regions where the first human groups found productive soils and mild climate they lived from the fruits of nature and ‘their flocks and herds’.\footnote{Ibid., 151.} It is evident that Mill did not get rid of the categories of hunter/savage and pastoralist/barbarian. However, for him they did not follow one another in temporal sequence. The first peoples of the world had become either savages or barbarians depending on the abundance of the natural habitats in which they lived.

In several passages of the Elements of Political Economy Mill also referred to the ‘savage’ who climbed ‘a tree’ and ‘gathered the fruit’, and to the savage who captured and killed ‘a wild beast’.\footnote{James Mill, Elements of Political Economy (London, Baldwin, Cradock and Joy, 1826) Ch I Section I 6; Ch I Section I 12; Ch I Section II 17; Ch I Section II 19; Ch I Section II 20; Ch IV Section III 228.} When he explained how capital first appeared, he also mentioned agriculture, situating it ‘at a subsequent stage in the progress of industry’ in comparison to hunting and gathering.\footnote{Ibid., 17.} He also distinguished between the ‘savage’ who ‘kills a dear’ and the ‘man, who cultivates’.\footnote{Ibid., 20. Emphasis added.}

Parallel to the material progress of different peoples, civil society developed through different stages. Various political and institutional arrangements were devised in order to satisfy the social needs created by the competition for natural resources that resulted from population growth. Once all the productive ground had been occupied disputes arose, and families joined together in order to better defend their interests.\footnote{The clashes and conflicts of interests derived from population growth planted the seeds of future progress. In the words of Mill: ‘When subsistence, byte multiplication of consumers, can no longer be obtained without considerable labour, the desire to encroach upon one another adds extremely to the occasions of discord: and the evils and miseries, which prevail, excite at last a desire for a better regulation of their common affairs.’ Mill, The History, Vol I Bk II Ch II 153.} So, first tribes appeared. At a later stage, population growth gave rise to the first rudimentary forms of monarchy.\footnote{Ibid., Vol I Bk II Ch I 152.}
After roughly outlining the origins of humanity and the first general stages of social evolution Mill examined the case of India. According to him, in their ‘way to civilization’ ‘the Hindus’ had ‘passed through the first’ rudimentary stage of society ‘very quickly’.61 There had left behind the ‘pastoral state’ characterized by the absence of a division of labor.62 Then they continued ascending through the agricultural stage and began to hold property.63 Once the cultivation of the land commenced, there was a compelling need to divide work tasks.64 The need for labor specialization became pervasive. As with Las Casas, he emphasized the importance of a superior man with the capacity to foster social progress. In the particular case of India, that man realized that, in order for society to advance, it was imperative to divide the population into different groups by occupation.65 That was the origin of the system of four castes.

The division of society into castes, which originally sprang from the growing complexity of the Indian productive system, became in time the reason for its stagnation. Once the castes were fixed by regulation, the social system lost the flexibility required to adapt to the new requirements of production and reach further progress.66 The only variation to the otherwise rigid system of castes sprang from the fact that the classes, which were meant not to mix, became intermingled. The result was the creation of a subclass of inferior Hindus.67 But their lack of a concrete occupation and social function threatened the stability of the whole society. In order to overcome this difficulty a ‘virtuous king’ decided to ‘assigned them occupations’, and thus the ‘arts and manufactures’ were created.68 And then Mill concluded: ‘This is another important era in the history of Hindu society; and having reached this stage, it does not appear that it has made, or that it is capable of making, much further progress.’69

Mill’s analysis of Hindu society showed that it had undoubtedly passed the savage and barbarous era. It was an agricultural society that had also developed trade and made some progress in the arts and manufactures.70 Mill remarked that the Hindu society had ‘passed but a small number of stages in the

61 Ibid.
62 Vol I Bk II Ch II 153.
63 Ibid., 157.
64 Ibid., 156.
65 Ibid.
66 Ibid.
67 Ibid., 171.
68 Ibid., 172.
69 Ibid.
70 Mill never defined India as a commercial society as a whole, but he affirmed that the cast of Vaisyas ‘carry on merchadize’. See, Ibid., 167. In another passage he concurred with the opinion of Mr. Orme who had stated that the Hindus were ‘the acutest buyers and sellers in the world’. Ibid., Vol I Bk II Ch VII 417.
career of civilization’, had ‘made a few of the first steps in civilization’, and even that it ‘had made considerable progress beyond the first and lowest stage of human society’.

Was this a great advance, one that had put India in a situation of parity or near parity vis-à-vis European nations? According to the four-stage stadial theory the Hindus, having agriculture and trade should have ranked them as an advanced nation. But Mill believed that this characterization was misleading. The high consideration of Indian society was actually the error in which Sir William Jones and other ‘orientalist’ and European missionaries and travelers had incurred. The case of North America illustrated his point:

The nations of Europe became acquainted nearly about the same period, with the people of America, and the people of Hindustan. Having contemplated in the one, a people without fixed habitations, without political institutions, and with hardly any other arts than those indispensably necessary for the preservation of existence, they hastily concluded, upon the sight of another people, inhabiting great cities, cultivating the soil, connected together by an artificial system of subordination, exhibiting monuments of great antiquity, cultivating a species of literature, exercising arts and obeying a monarch whose sway was extensive, and his court magnificent, that they had suddenly passed from the one extreme of civilization to the other.

Because Mill did not want to commit the mistake he imputed to others, he deviated from the type of conclusions about India that would have been derived from a strict application of the doctrines of standard conjectural history. In doing so, he neither did away with stadial theory nor merely simplified it. In fact, he problematized it, thus complicating it. Paradoxically, the result was a simplification of the categorization of non-European peoples.

Mill believed that the fact that a particular society had reached highest stages of social advancement described in classical stadial theory—that is, the agricultural and commercial phases—did not necessarily mean that the society had attained a high degree of civilization. This is why he complained that ‘with the exception of one of the lowest state of society’ the terms civilization ‘was applied to nations in all the stages of social advancement’. The old standard of measure for social evolution was flawed. The entry of a nation into the agricultural and commercial phase did not necessarily indicate social advancement

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71 Ibid., Vol II Bk II Ch X 157.
72 Ibid., Vol II Bk II Ch IX 99. A very similar implicit affirmation can be found in Ibid., Vol II Bk II Ch X 135.
73 Ibid., Vol I Bk II Ch VI 285.
74 Mill mentioned the case of the Jesuits in China and European travellers in the Mogul Empire. Ibid., Vol II Bk II Ch X 136-137.
75 Ibid., 143.
76 Ibid., 138.
and sophistication. The old ladder of progress had to be reformulated, as there were obviously more steps than the four standard stages of stadial theory. Mill’s assessment of India’s state of social advancement was the best opportunity to make a contribution to historical speculation about human and social progress.

Once Mill had concluded that from a material point of view India had become stagnant, he set himself the challenging task of examining in Book II of The History all aspects of Indian society. His conclusions about the various components of Hindu life were remarkably uniform and somber. He found them all wanting.\(^7\) The government was simple and rude, its military art deficient, and so were the system of justice, laws, tax system, religion, manners, arts, and literature. There was no aspect of Hindu society worth praising.\(^8\) The same harsh judgment was passed over Indian population. They exhibited some of the worst human vices, such as ‘ferocity’, ‘malignity’, ‘avarice’, ‘insensibility to the suffering of others’, and even ‘active cruelty’.\(^7\)

In his view, the Hindustan had made no progress since time immemorial. The English had found it in the same state as the ancient Greeks.\(^8\) In fact when measured up to the ‘people of Europe, during the feudal ages’, the Hindus were clearly inferior.\(^1\) The stationary condition of all their institutions, manners, and character was the result of the excessive influence of the priesthood over every realm of life. Religion and superstition had frozen the Hindu nation and the Hindu mind in a crude state. A despotic government and wretched system of castes further fixed the system, preventing any type of advancement. The state of India was rather unfavorable. Mill concluded that ‘despotism and priestcraft taken together, the Hindus, in mind and body, were the most enslaved portions of the human race’.\(^8\)

Mill identified education as the best tools for social improvement, but only if it was implemented in the way he conceived it. According to Mill, ‘the most efficient part of education is that which is derived from the tone and temper of the society: and the tone and temper of the society depend altogether upon the laws, and the government.’\(^8\) So, colonial reform had to be wide in scope. Sound legislation and good British government could reach and reform every aspect of Indian society. But Mill denounced that British administration had not yet implemented the ambitious program of reform that he envisaged. His

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\(^7\) Mehta is right when he emphatically affirms that the views of Mill regarding India were ‘unremittingly dark’ and perhaps, more importantly, that they were characterized by a ‘lack of nuance’. Mehta, Liberalism and Empire, 90.

\(^8\) A noteworthy exception is Mill’s judgment of the shape of Indian women. He wrote: ‘The female form, in particular, frequently attains in India its most exquisite proportions’. See Mill, The History, Vol I Bk II Ch VII 409. He also found the body of the Hindus ‘agile, in an extraordinary degree’. Ibid., 411.
recommendations were meant to change this state of affairs. It was vital that British intervention in India was also extensive in time because ‘[t]he human race’ was ‘not destined to make many steps in improvement at once’. The speed at which a backward mind could be awakened by reforms was limited; hasting too much could backfire. He gave as an example the introduction of the freedom of the press. Due to the ‘mental state of the people of India’, he argued, ‘the unrestrained use of the press’ might cause ‘inconveniences of a serious nature’. Reform had to proceed gradually.

Mill had reworked stadial categories typical of the Scottish Enlightenment, applying his own standard of civilization to the assessment of India’s degree of social advancement. For Mill the classical stages of agriculture and commerce did not correspond to the highest threshold of civilization. The ladder of progress had more steps than was before assumed. He repeatedly reminded his audience that there were many steps on the path toward improvement and that the Hindus had just made but a few of the earliest steps in civilization. Mill's scale of progress seemed at first glance broader than that of previous Scottish authors. On closer scrutiny, however, despite the enlargement of the ladder of social evolution the civilizational categories that Mill used were rather simple and detrimental for non-European peoples. What is more, his idea of evolution of the mind in parallel to social evolution provided a further rationale for imperial control of alien societies. A society peopled by crude minds called for a stronger and more thorough external intervention than, for example, a society that just lacked trade or agriculture.

Mill’s ladder of evolution was divided into three simple compartments: those of the uncivilized, the semi-civilized, and the civilized. First, there were the uncivilized peoples. In this first category, Mill placed both the savage and the barbarian. There were few nations in the world that fell under that category, but those that had remained in the lowest stages of society clearly lived a miserable and ignorant existence. Mill also referred to half-civilized peoples and half-civilized nations. Finally, there were the civilized nations. India stood ‘little removed from’ that condition of the ‘half-civilized nations’. Most Asian nations were ‘in a state of civilization very nearly the same with’ the Hindus.

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84 Ibid., Vol I Bk II Ch II 156.
85 Ibid., Vol V Bk VI Ch VI 542-543.
86 Ibid.
87 Ibid., Vol I Bk II Ch VII 421; Vol II Bk II Ch IX 99; Vol II Bk II Ch X 135
89 Ibid., Vol II Bk II Ch X 144.
90 Ibid.
91 In particular, he mentioned the Chinese, Persians, Arabians, Japanese, Burmans, Malays, Tibetans, Cochin-Chinese, and Siamese. Ibid., 189.
Importantly, the scale of human civilization allowed cross-temporal comparisons. For example, the Portuguese people in the seventeenth century were considered ‘half civilized’. As Mill contemplated his contemporary Hindus, the life of ancient nations passed before his eyes. As he put it:

As the manners, institutions, and attainments of the Hindus, have been stationary for many ages; in beholding the Hindus of the present day, we are beholding the Hindus of many ages past; and are carried back, as it were, into the deepest recesses of antiquity. Of some of the oldest nations, about which our curiosity is the most alive, and information the most defective we acquire a practical, and what may be almost denominated a personal knowledge, by our acquaintance with a living people, who have continued on the same soil from the very times of those ancient nations, partake largely of the same manners, and are placed at nearly the same stage in the progress of society. By conversing with the Hindus of the present day, we, in some measure, converse with the Chaldeans and Babylonians of the time of Cyrus; with the Persians and Egyptians of the time of Alexander.

The non-European world in the wide multiplicity of nations and the depths of historical time lay open to the scrutinizing eye of Mill. The world that resulted from Mill’s conceptualization of cross-social difference was a world of deep contrasts. In his scheme of social progress, backward and advanced nations were further from each other than ever before. And the distance kept growing, due to the static character of the former and the progressive nature of the latter.

What were the implications of Mill’s ideas for the peoples of Australia who were regarded by British colonists as savages? In Mill’s scale of social progress that category represented the lowest type of human existence. Considering that for him Indian society displayed such a level of imperfection, it was easy to imagine what conclusions could be drawn about the savage peoples of Australia in terms of civilization. Moreover, his evaluation of savage North American peoples is telling. Even the more pluralistic John Millar had remarked that ‘when we survey the present state of the globe, we find that, in many parts of it, the inhabitants are so destitute of culture, as to appear little above the condition of brute animals’. The British colonization of Australia had revealed the existence of precisely the kind of societies that for someone like Mill embodied the depravity of which Millar had talked.

According to Mill good colonial rule required a sound assessment of the degree of social evolution of a particular people. Otherwise, imperial policies risked delaying or even forestalling the amelioration of

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92 Ibid., Vol I Bk I Ch I 3.
93 Ibid., Vol II Bk II Ch X 190.
a particular nation. Again, a comparison with the Indian case may illustrate the way in which a colonial administrator acquainted with Mill’s theories might have approached the government of Australia. If in the case of India the British had to guide the development of every branch of society, controlling, government, taxes, laws, land, education, etc., in the case of Australia the power in British hands had to be even larger, as Australians were far more distant than Hindus from the mental and social states suitable for self-government. This does not mean that Mill advocated the colonization of Australia. In fact, the contrary was true. For economic reasons he opposed the foundation of new colonies far from British territory. But in purely civilizational terms it was clear that savage life had to be brought in line with more sophisticated social standards.

What was the role of nature in Mill’s doctrines of social advancement? He did not consider nature as pure matter devoted of inner forces. On the contrary, nature was animated matter. In order to produce, ‘[a]ll that men can do is to place the objects of nature in a certain position’.95 Human power over nature was limited to performing a set of motions; it was actually matter that generated the productive result. For Mill, human production was the result of the combination of human labor and the laws of nature.

Mill’s acknowledgment of the inner productive quality of ‘matter’ did not amount to recognizing nature’s sacredness or even the parity of humans and nature. In fact, in The History Mill, as Acosta before him, regarded the belief in the divinity of nature as a definite proof of the backwardness that prevailed ‘among rude tribes’.96 The savage venerated the sun and found spirits everywhere around him. Even the Brahmans in India were fearful of the mysterious power of nature and, in consequence, tried to procure its favor through different religious rites.97 The deification and fear of nature were characteristics of rudimentary minds. So was the Indian belief that animals and plants had internal consciousness and were able to feel pain and pleasure.98 Mill even considered with a mixture of curiosity and disdain the Hindu’s ‘superstitious care of the life of inferior animals’.99 There was no doubt that animals as with the rest of nature were inferior creatures. Thus, there was no external limit to the application of the human intellect to the elucidation of the laws of nature, a knowledge that enabled the manipulation of the environment for the attainment of material progress. Harnessing nature through science and technology were signs of

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95 Mill, Elements, Ch I 6.
96 Mill, The History, Vol I Bk II Ch VI 284
97 Ibid., Vol I Bk II Ch II 166.
98 Ibid., Vol II Bk II Ch IX 86
99 Ibid., Vol I Bk II Ch VII 403.
high civilization. Conversely, Indian unscientific explanations for the laws of nature was a proof of rudeness.\textsuperscript{100}

Mill retained from conjectural history the idea that the degree of mastery over the environment was a mark of social advancement. Two innovations in the way in which humans could affect their habitats were vital for the improvement of the human condition from the first stages of society to the peak of civilization. Once humans had become acquainted with the regularities of nature they could better devise instruments that amplified their power over it. Technological progress had created a gulf between the life of the savage and that of ‘the great capitalist, the owner of a manufactory’.\textsuperscript{101} Whereas the former applied his muscles directly to nature, the latter had created machines that increased the wealth that humans could squeeze out of their surroundings. Technological advance led to the improvement of human productive capabilities.\textsuperscript{102} In addition, the division of labor was indispensable for an efficient production of commodities.\textsuperscript{103} Specialization allowed the production of infinite commodities out of natural materials, exchanging them for monetary value. A society in which nature could be transformed, packed, and commercialized had undoubtedly reached the apex of material advancement.

\textit{John Stuart Mill, stadial theory, and settler colonialism}

The famous first-born son of James Mill and his wife Harriet Burrow came into the world on 20 May 1806.\textsuperscript{104} John Stuart Mill was born on Rodney Street, Pentonville, a suburb of London.\textsuperscript{105} The most noteworthy aspect of Mill’s early life was the outstanding informal education that he received. As mentioned earlier, the elder Mill tutored him and made John Stuart’s intellectual upbringing one of his life’s priorities. His efforts were not in vain. Despite never having attended school or university John Stuart Mill was a young prodigy.

He learnt Greek at the age of three so he could read Plato in his mother tongue.\textsuperscript{106} By the age of six he started to create his first texts, writing a history of Rome.\textsuperscript{107} Only two years later he began learning

\begin{thebibliography}{99}
\bibitem{100} Ibid., Vol II Bk II Ch IX 84-86.
\bibitem{101} Mill, \textit{Elements}, Ch I Sect. II 21.
\bibitem{102} Mill, \textit{Elements}, Ch I 9-10.
\bibitem{103} Ibid., 9-12.
\bibitem{107} Reeves, \textit{John}, 12.
\end{thebibliography}
Latin.\textsuperscript{108} Mill absorbed knowledge at a remarkable pace. From an early age, his education comprised a vast number of readings of varied and eminent authors such as Homer, Plutarch, Cicero, Plato, Aristotle, Newton, Shakespeare, Cervantes, Milton, Spencer, Hume, Smith, and Ricardo, just to name a few.\textsuperscript{109}

There were also some dark clouds in John’s outstanding education. The sole emphasis on his rational development had the downside of a lack of attention to his emotional and social needs. The younger Mill would eventually pay a heavy toll for the absence of affection in his rearing and the loneliness that accompanied him in his early years.\textsuperscript{110} He experienced a full-blown mental crisis in the autumn of 1826 at the age of 20, a type of episode that continued to happen on occasion, albeit mildly, later in his life. Several factors converged in the genesis of his melancholic state. The winter of 1826 was particularly gloomy. What is more, he felt lonely and tired out, rather unsettling factors on their own ground.\textsuperscript{111} On top of things, his intellectual foundations were strongly shaken, which provoked a sense of betrayal toward his father.\textsuperscript{112} All those contingent factors were exacerbated by a recurrent state of social isolation and a lack of emotional closeness. When Mill sank into depression, he had nobody close with whom to share the heavy load of his agitated mind.

Fortunately, Mill recovered quickly once he was able to get in touch with his emotions. While reading Marmontel’s \textit{Memoirs} tears began to run down his cheeks. At that moment he realized that, fortunately, he was not like ‘a stock or a stone’ because he could finally feel something.\textsuperscript{113} From then on, Mill decided to redress the imbalance of his earlier education by paying attention to his emotional needs. Thus, he turned to poetry and the arts.\textsuperscript{114} The crisis had another important effect: he uncritically followed the intellectual footsteps of his father no longer. Mill opened his mind to different philosophical, cultural and


\textsuperscript{109} Collini, \textit{J.S. Mill}, 6-7.

\textsuperscript{110} In his Autobiography Mill recounts the severity and lack of patience with which his father raised him, ‘constantly meriting reproof’. See Mill, \textit{CW}, Vol I Ch I 39, Ch II 53. Moreover, he explained that his father ‘resembled almost all Englishmen in being ashamed of the sign of feeling’; Ibid., Ch II 53. And he added: ‘The element which was chiefly deficient in his moral relation to his children, was that of tenderness’; Ibid. In the same vain, Mill resented the lack of maternal closeness and love toward him, something he believed had also limited his father’s capacity for affection; \textit{CW}, Vol I Ch II 53 (early draft) and \textit{CW}, Vol I 612 (appendix G).


\textsuperscript{112} For an interesting psychoanalytical explanation of Mill’s crisis, see Mazlish, \textit{James & John}, 205-220.

\textsuperscript{113} Mill, \textit{CW}, Vol I Ch V 145.

\textsuperscript{114} Ibid., 146.
political positions.\textsuperscript{115} He blended those influences with the empiricism and utilitarianism in which he had been raised, dedicating his life, time, and energy to reform and rethink the main tenets of liberal culture.\textsuperscript{116}

In the last years of his life, Mill focused his critical energy on the struggle for women’s rights and the improvement of the condition of the working class.\textsuperscript{117} He also reflected and wrote on the role of religion and the future of socialism.\textsuperscript{118} On May 7, 1873, at the age of 67, he died of eripypelas, a bacterial infection, in Avignon.\textsuperscript{119}

During his prolific career as a public servant, journalist, philosopher, politician, editor, and campaigner, John Stuart Mill was to achieve high intellectual stature. Ever since, his reputation has not decreased. If anything, the breadth and depth of his work has elevated his fame to the point of being commonly regarded as one of the most reputed thinkers of the XIX century. Mill directed his scholarly attention and reformative agenda to the complex social, political, economic, cultural, and religious changes that swept across English society in the aftermath of the Industrial Revolution. Still, he never lost sight of the broader project that imbued his intellectual career: the improvement of mankind, which according to him was one of the few pursuits that could make life a happy experience.\textsuperscript{120} Love was the quintessential force that animated this noble enterprise.\textsuperscript{121} In fact, the betterment of the human lot was tantamount to a faith without God: the religion of humanity.\textsuperscript{122}

As in the case of his father, Mill’s cosmopolitanism broadened his intellectual horizons so that his reflections encompassed the whole world. Reality outside Europe was an important object of inquiry. His writings frequently engaged with the question of Empire and the degree of social advancement of non-European peoples. Due to his views on these matters, several authors have regarded Mill as an ardent

\textsuperscript{115} As Reeves puts it: ‘after his “crisis”, nobody ever took hold of Mill’s mind again’. See Reeves, John, 105. For a detailed analysis of how Mill’s crises influenced his intellectual position see Halliday, \textit{John Stuart Mill}, 20-68.

\textsuperscript{116} Collini, \textit{J.S. Mill}, ix.

\textsuperscript{117} Ibid., 350.

\textsuperscript{118} Reeves, \textit{John}, 451.

\textsuperscript{119} Ibid., 479.


\textsuperscript{122} Mill subscribed to Comte’s idea of a religion of humanity, though differing in its concrete outline. He held that ‘the sense of unity with mankind, and a deep feeling for the general good, may be cultivated into a sentiment and a principle capable of fulfilling every important function of religion and itself justly entitled to the name… It is not only entitled to be called a religion: it is a better religion than any of those which are ordinarily called by that title.’ See John Stuart Mill, ‘Essays on Ethics, Religion and Society’ in John Robson (ed.), \textit{The Collected Works of John Stuart Mill} (Toronto, University of Toronto Press, 1981) Vol X 422.
advocate of British imperialism. In contrast, others have claimed that his perspective on non-European people was more tolerant, complex, and flexible than the former camp of authors have acknowledged. In this light, it has been argued, for example, that his theories contained both imperialist and anti-imperialist tendencies. What is more, in his last years of his life a series of events made him more hesitant about the benefits that empire brought to non-Europeans, while still not completely renouncing the idea of empire per se. Ambiguity about imperialism was predominantly the result of Mill's disenchantment with the violence that pervaded the way in which the British ran their colonies. British greed and brute force in colonial societies were an instable and dangerous combination.

Mill’s engagement with British imperialism was not only the result of detached abstract theorizing. Following his father’s footsteps, he started working for the EIC as a simple clerk at age seventeen, and remained at the service of the EIC for 35 years. He progressively ascended the ranks of the Indian House until becoming Chief Examiner of Indian Correspondence in 1956, which gave him a power similar to that of a Secretary of State. He served at the Political Department, where he dealt with the independent territories under the rule of an Indian chief and in which the British retained partial jurisdiction. Mill defended the continuation of the EIC’s administration of India against the idea of a direct involvement of the state. Adherence to this stance made him resign from his position once the government of India was transferred to British administration. In addition, he declined the State’s invitation to hold a new position in the recently created Indian Office.

John Stuart Mill showed a vivid interest as well in the new British possessions in the Pacific. His views on the settler colonies of Australia and New Zealand were influenced by those of Edward Gibbon

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125 See Duncan Bell, ‘John Stuart Mill on Colonies’ 38 Political Theory (2010) 34-64.


Wakefield, a political economist that advocated state-sponsored systematic colonization. In 1830 Wakefield created a Colonization Society, with the aim of promoting British settlement of the South Pacific. The following year, Jeremy Bentham, who had converted to Wakefield’s creed, drafted a charter for the proposed Colony of South Australia and suggested naming it Felicitania. In 1834, Mill joined the South Australian Association, which had been created the previous year, campaigning for the involvement of the British state in the creation of a new colony with that name. Mill also invested directly in the new colonial enterprise, buying land in New Zealand.

Mill’s philosophy of history had the imprint of the conjectural history of the Scottish Enlightenment. He loved reading history, and as a consequence of those readings he had his mind ‘full of details of the history of the obscurest ancient people’. As part of his early education, he had read the works of Robertson, Gibbon, Ferguson, Millar, and Smith. In addition, James Mill influenced John’s conception of philosophical history both directly and indirectly. A part of his intellectual formation his father transmitted to him ‘explanations and ideas respecting civilization’. His father’s *History of British India* also exercised particular influence over the younger Mill. As he stated in his autobiography:

The number of new ideas which I received from this remarkable book, and the impulse and stimulus as well as guidance given to my thoughts by its criticisms and disquisitions on society and civilization in the Hindoo part, on institutions and the acts of government in the English part made my early familiarity with this book eminently useful to my subsequent progress. And though I can perceive deficiencies in it now as compared with a perfect standard, I still think it the most instructive history ever yet written.

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133 Ibid., 11, 15 and 31. This notwithstanding, Capaldi considers that much of the Scottish Enlightenment was absent from Mill’s reading list during his formative period. See Capaldi, *John Stuart Mill*, 8.
134 Ibid., 11.
His father also encouraged Mill to read the works of Philip Beaver, an officer of the Royal Navy that participated in a failed attempt of settlement in Africa, and Captain-Lieutenant David Collins, one of the founders of the colony of New South Wales. These books contained adventures of adventurers and pioneers who participated in the exploration and colonization of Africa and New South Wales. They portrayed virtuous, energetic, and resourceful individuals facing insurmountable obstacles in their effort to tame wilderness. In his Africa Memoranda Beaver showed appreciation for the African people. His philanthropic leaning was exhibited in his desire to civilize and liberate Africans from slavery by introducing cultivation. The colonists of New South Wales were equally animated by the prospect of ‘establishing civilization in the savage world’. 

Mill’s conception of civilization first appeared in his Essay on Civilization. In this work, he distinguished between two different senses of the term civilization. In the ‘narrow sense’ civilization denoted a particular kind of social improvement, namely, one characterized by material amelioration. In this sense, civilization was the antithesis of savagery and ‘rudeness or barbarism’. Civilization could also be understood, Mill held, as holistic human betterment. This was the kind of improvement that led individuals and societies on the road to perfection, toward a ‘happier, nobler and wiser’ existence.

In Mill’s philosophy of history savagery and civilization were antithetical. He explained the contrast between these opposite types of society by reference to a series of familiar standards characteristic of stadial theory. A savage community was composed of wandering individuals ‘scattered over a vast tract of country’ with ‘no commerce, no manufactures, no agriculture or next to none’. Conversely, a civilized society comprised of a ‘dense population … dwelling in fixed habitations … and rich in the fruits of agriculture, commerce and manufactures’. The productive capacity of a civilized society was complemented by the legal guarantee of personal security and private property, measures of protection that redounded in the increase of ‘wealth and population’. Europe and Great Britain in particular exhibited the typical features of a civilized and affluent area/society that was in constant progress.

138 Beaver, Africa Memoranda, 3.
139 Collins, An Account, 60.
141 Ibid., 119.
142 Ibid., 120.
143 Ibid.
144 Ibid.
145 Ibid., 120-121.
the other end of the spectrum, the absence of a system of law and administration of justice made savage societies vulnerable to the threat of continuous conflict, thus hindering the possibility of advancement.146

In his reflections on civilization in the ‘narrow sense’, Mill used classical elements of conjectural history like material production and property, combining them with novel factors such as intelligence. While increases in intelligence and the apparition of the notion of property were surely hallmarks of civilization, they were still incomplete without another quintessential factor that Mill added to the equation: co-operation. Savages and slaves were ‘incapable of acting in concert’.147 They were not totally unintelligent, but their intelligence was not enough to form a superior common purpose and to adhere to it.148 Perfect co-operation and the capacity of organized combination were distinguished attributes of civilized life.149

Mill provided numerous examples demonstrating that in the most advanced European nations intelligence, property, and the capacity to co-operate were expanding the horizons of human progress at a swift pace. The increase of the ‘physical and mental power’ of the masses was in itself a remarkable achievement, and hence something to be celebrated.150 Civilization in the ‘narrow sense’ was clearly good.151 Material advancement was an indispensable constituent element of social progress. In consequence, those who remained outside the threshold of civilization had first to undertake the necessary changes in order to reach the economic level that prepared them for the next step on the ladder of progress. This twofold division of social advancement was reminiscent of the classifications used by the elder Mill.

Despite its merits, the ‘narrow type’ of civilization was not a straightforward path to the supreme cosmopolitan goal of human happiness. Moreover, without proper guidance, ‘new rules and new courses of action’, it was likely that it would actually hinder ‘the road to perfection’.152 It was evident for Mill that this had actually happened in contemporary Europe. The clearest indication of this state of affairs was the absence of notable intellectual and moral works and achievements.153 In Europe the natural growth of the ‘narrow type’ of civilization had produced the biggest obstacle for further progress as the masses had swallowed the individual and his energy, and with it the ‘influence of superior minds over

146 Ibid.
147 Ibid., 122.
148 In other words, ‘they had control, but not self-control’, Ibid.
149 Ibid., 122-123.
150 Ibid., 125.
151 Ibid., 119.
152 Ibid.
153 Ibid., 126.
the multitude’. That was a rather unwelcome development, one that needed urgent fixing through a panoply of new laws, policies, and practices.

Did Mill’s diagnosis mean that advanced European societies had to renounce material progress and wealth in their quest for perfection? His answer was conclusive: ‘Assuredly not’. There was a cure for each of the symptoms that the illness of unrestrained material affluence had created. To counter the first evil—the evanescence and impotence of the individual absorbed by the crowd—Mill prescribed evermore co-operation. The second evil—the loss of individual energy, resourcefulness, and dynamism—could be remedied through national institutions and programs of education, combined with changes in policy and social practices.

In the Essay on Civilization John Stuart Mill had painted a crude picture of savage societies. This category was further developed in the Principles of Political Economy, published in 1848, where Mill elaborated the different stages of social development. In his exploration of the laws that explained the accumulation of wealth in different nations and times Mill put forward a rather typical account of stadial theory. The beginning of the social scale is by now familiar. The most backward type of society was inhabited by some of Mill’s contemporary tribes that still lived from hunting, fishing, and gathering. They covered their bodies with animal skins and lived in rudimentary huts. This state of society, characterized by great poverty, was the lowest point of human existence, just above the condition of animality. The exertions of savages to procure subsistence were continuous, leaving little time for leisure and the cultivation of the mind. As a result, little of merit was ever produced at this early stage of social development. The conclusion was clear: savagery was a definite stumbling block in the road toward civilization.

The second state of society was pastoralism. The domestication of useful animals provided a ‘constantly increasing stock of subsistence’. Raising flocks and herds was an enterprise that demanded far less human energy than hunting. As a result, leisure increased. Similarly, the wants and desires of the

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154 Ibid., 135.
155 Ibid.
156 Ibid., 136.
157 Ibid.
159 Ibid., Vol II, preliminary remarks, 10.
160 Ibid.
161 Ibid., 11. For the comparison with animals see supra footnote 5.
162 Ibid.
members of pastoral communities expanded. In response to these transformations, social complexity increased. Domestic manufactures filled the new needs for ‘clothing, utensils, and implements’. Free time permitted exercising and expanding the mind, which fostered developments in the human capacity to penetrate the mysteries of reality, as the apparition of speculative science demonstrated. The growth of material wealth was accompanied by an increase in social inequality. Unlike the savage state, the shepherd state was characterized by unequal possessions. This notwithstanding, pastoralism represented a clear advancement in comparison to the stage of hunting-gathers. Furthermore, the shepherd period facilitated the transition to an even higher state of society.

The inability of the old productive system to feed a growing population precipitated the changes that made it possible to further squeeze the earth’s natural wealth. The land was tilled for the first time and agricultural communities emerged around this activity. Under the new system of production food availability increased exponentially, and so did the population. But achieving a higher level of social improvement was no guarantee of automatic wealth. The beginnings of the new stage were far from rosy. In fact, rudimentary agriculture meant harder work and little leisure, except in the rare cases in which the land was rather fertile. Moreover, further progress took a long time.

After having arrived at the third stage of society Mill explained the historical divergent paths that Asiatic and European agricultural communities had taken thereon. They both had had rudimentary manufactures and a small commercial class. But whereas the former remained stagnant under a monarchic system, the latter continued progressing. Under the stimulus of a thriving bourgeois class, agricultural feudal Europe had moved into ‘commercial and manufacturing Europe’. As a consequence of these changes in the productive structure, the most advanced European societies had reached a level of progress unmatched in the history of mankind. They were surely at the apex of human civilization.
As his statements about Europe and Asia clearly demonstrated, humanity had not moved uniformly through the four social stages that Mill had delineated. Rather, the world was a mosaic of polities that widely differed in terms of wealth and social sophistication. There were living examples of hunting, pastoralist, agricultural, and commercial-manufacturing communities.\footnote{175}

What were the causes that accounted for the existence of such disparate social states? Like his father, John Stuart Mill did not single out any specific explanatory factor, but pointed instead to a variety of reasons. Some of them belonged to the moral and psychological spheres and depended on ‘institutions and social relations’.\footnote{176} Importantly, others related to the knowledge of the ‘laws of nature’ and the capacity to use that knowledge to extract ‘the instruments of human subsistence and enjoyment from the materials of the globe’.\footnote{177}

Mill’s conception of nature in Principles was similar to his father’s. Nature was not motionless matter. On the contrary, the powers of nature were of foremost importance for the production of wealth. Production was the result of mixing human labor and nature’s intrinsic powers.\footnote{178} In fact, ‘all that man does, or can do’, Mill affirmed, was ‘putting things into fit places’ so that the internal powers of nature could act upon them.\footnote{179} Did this mean that nature was more important than labor for the production of wealth? Did nature’s aliveness set limits on human acquisitiveness and the desire to consume its materials?

For Mill, nature played two main roles in the production of wealth. In addition to its internal powers, it also furnished the raw materials to which human labor could be applied.\footnote{180} Of these two functions, the provisioning of raw materials was the most important.\footnote{181} So, the availability of raw materials and the application of labor onto them were the essential elements of human productiveness. But even between these two aspects the balance tipped in favor of human agency. Better natural endowments such as fertile soil, mild weather, abundance of mineral resources, and easy access to the sea offered a clear productive advantage.\footnote{182} However, even a deficient natural habitat could be compensated by sustained and preserved human energy applied to its modification. Throughout history, poor but hard working communities had anything in short which requires expense, and to do it with no sacrifice of the necessaries or even the substantial comforts of its inhabitants, are such as the world never saw before.’ Ibid., 19.

\footnote{175} Ibid., 20.
\footnote{176} Ibid., 20-21.
\footnote{177} Ibid.
\footnote{178} Ibid., 25-28.
\footnote{179} Ibid., 27.
\footnote{180} Ibid., Book I Ch VII §1100.
\footnote{181} Ibid.
\footnote{182} Ibid., § 2 101-102.
often surpassed their richer counterparts in the pursuit of material affluence. Increase in wants and desires acted as a powerful incentive for labor. In light of these conclusions, it was natural that Mill believed that the indolence of the ‘North American Indian’ condemned him to a precarious life. In order to ‘civilize a savage’, he ought to be inspired with new wants and desires so that ‘their gratification’ could be ‘a motive to steady and regular bodily and mental exertion’.

Material acquisitiveness and the desire of riches was a powerful driver of behavior, encouraging humans to work and further transform their habitats in order to achieve a life of plenty. But as population grew and desires multiplied the extraction of natural resources intensified; a fact that could potentially exhaust them. Exhaustion of resources meant low productivity, and that in turn was equivalent to meager returns. This was, in a nutshell, the economic law of diminishing returns.

Mill offered a simple way out of this conundrum: an increase of human power over nature. The extension of human ‘knowledge of the laws of nature’ resulted in innovation, technical advancements, and ‘new processes of industry’ which in turn permitted the surmounting of nature’s limits and the maintenance of high productivity. In the words of Mill, human knowledge and power over nature succeeded in ‘making for ourselves more space within the limits set by the constitution of things’. Mill gave concrete examples that illustrated how superior skills, techniques, and machines applied to agriculture and mining helped enhance productivity and overcome nature’s boundaries. The law of diminishing returns could be reversed by whatever added ‘to the general power of mankind over nature; and especially by an extension of their knowledge, and their consequent command, of the properties and powers of natural agents’.

Mill’s conception of the human/nature relationship in the Principles is in line with ideas presented later in his life in Nature, an essay written between 1850 and 1858. In this work the term nature had two different meanings. On the one hand, it referred to ‘the entire system of things’ or, in other words, the sum of ‘all phenomena’ and ‘the power and properties of all things’. On the other hand, it denoted

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183 Ibid., § 3 102-103.
184 Ibid., 103
185 Ibid., 104.
186 Ibid., Book II Ch 1 §1 199.
187 Ibid.
188 Ibid., Book I XII §3 179-185.
189 Ibid., Book I Ch XII § 3 185.
191 Ibid., 374, 379, 401.
the way in which the world was without human intervention.\textsuperscript{192} It was in this second sense that art and nature were opposites, and so were the adjectives ‘artificial’ and ‘natural’.

The relationship between humans and nature was different depending on which of the two senses of the latter term one employed. As for the first meaning, it was logical that humans could just follow nature and not intervene in it because the term comprised everything that existed.\textsuperscript{193} In \textit{Principles}, Mill affirmed that the limits of nature and the mind were not infinite and, thus, humans could not alter their ‘ultimate properties’.\textsuperscript{194} This did not mean, however, that humans could not carve for themselves a niche of freedom within the realm of existence. Human beings could not evade the ‘laws of nature’, but they could direct them toward a purpose that was desirable to them.\textsuperscript{195} This was the great insight of Bacon: humans could ‘obey nature in such a manner as to command it’.\textsuperscript{196}

Nature could also be understood in a narrow sense: as opposed to craftsmanship. So conceived, Mill wondered whether it was good to let nature freely run its course or whether humans ought to intervene in it and amend it.\textsuperscript{197} Traditional religious beliefs presented nature as God’s work and creation.\textsuperscript{198} The fear of interfering with God’s designs had historically curtailed attempts to transform nature, thus hindering human improvement.\textsuperscript{199} But this did not need to be the case. The modification of nature was not inevitably opposed to religiosity; on the contrary, the essence of religion was defined as the duty of ‘man … to amend himself’ and to amend ‘the world’.\textsuperscript{200}

Nature was not a realm of order and perfection. In fact, Mill sustained that nature contained an immense destructive power within it and had a great capacity to produce evil.\textsuperscript{201} Without a stern control over it, humans were certainly destined to suffer its ‘perfect and absolute recklessness’.\textsuperscript{202} Nature killed, caused terror, tortured, and destroyed sources of provision, which drove millions to starvation.\textsuperscript{203} What

\begin{itemize}
\item \textsuperscript{192} Ibid., 401.
\item \textsuperscript{193} Ibid.
\item \textsuperscript{194} Mill, \textit{CW}, Vol II, Book II Ch 1 §1 199.
\item \textsuperscript{195} Mill, \textit{CW}, Vol X, Nature, 379. There is a similar thesis in Mill’s \textit{Principles}, namely, that humans could employ the properties of nature more or less successfully, which gave them quite a degree of power over their fate. See Mill, \textit{CW}, Vol II, Book II Ch 1 §1 199.
\item \textsuperscript{196} Mill, \textit{CW}, Vol X, Nature, 379.
\item \textsuperscript{197} Ibid., 380.
\item \textsuperscript{198} Ibid., 381-382.
\item \textsuperscript{199} Ibid., 381.
\item \textsuperscript{200} Ibid., 383.
\item \textsuperscript{201} Ibid., 384.
\item \textsuperscript{202} Ibid., 384.
\item \textsuperscript{203} Ibid., 384-386.
\end{itemize}

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is more, ‘she’ did all that with ‘disregard both of mercy and of justice’. In the realm of animated creatures the prospect was no rosier. Unless ‘tamed and disciplined by men', 'the animal kingdom' presented also an ‘odious scene of violence and tyranny’. What Mill called ‘lower animals’ could just be divided between ‘devourers and devoured’. Sensitive to abuses of power, Mill saw the animal world through human lenses and despised the fact that the stronger destroyed the weaker.

In consideration of the overwhelming evidence of nature’s destructiveness, it was logical that not only irreligious people but also religious ones ought to encourage ‘human rational creatures to rise up and struggle against’ it. Nature was a realm laden with deficiencies, dangers, and devastation. The same could be said about human nature. For the sake of the progress of mankind it was incumbent upon humans to intervene in the natural world in order to reform and reshape it by taming, directing, controlling, and commanding nature.

In Book IV of Principles Mill dealt again with the question of human power over nature. In spite of significant divergences between the four social stages of progress he identified an undercurrent of economic change that was common or was to eventually be common to all of them. Mill affirmed that the most advanced societies and ‘all others as they come within the influence of those leading countries’ were increasing in material prosperity. There were several reasons for this momentous expansion of the world’s wealth. The first was ‘the perpetual, and so far as human foresight can extend, the unlimited, growth of man’s power over nature’. According to Mill, human command over non-human nature, which was ‘still almost in its infancy’, stemmed from the combination of increased scientific knowledge of physical laws and the translation of that knowledge into physical power through technology. The

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204 It is interesting that Mill used the gender-specific feminine pronoun to refer to nature. As with most of his contemporaries and previous intellectuals, he also used the masculine noun man/men to refer to humans. So the human/nature distinction was often articulated as a gender opposition articulated through the use of a feminine pronoun and a masculine noun.
205 Ibid., 385.
206 Ibid., 398.
207 Ibid., 399.
208 Ibid.
209 Ibid., 386.
210 Capaldi sees in Mill the Protestant logic of ‘transforming the world by imposing a divinely inspired order upon it’. See Capaldi, John Stuart Mill, 347. It is interesting that Mill draw the same conclusion about human nature. So all nature, be it internal to humans or external to them, had to be amended. See Mill, CW, Vol X, Nature, 397. The collapse of the internal and the external human realms as domains of reform and amelioration is another parallel between Mill’s thought and Protestant theology.
211 Mill, CW, Vol III, Book IV Ch I §1 705-706.
212 Ibid., §2 706.
213 Ibid.
‘application of science to practical uses’ was changing the face of the Earth.\textsuperscript{214} It was also enabling humans (at least some of them) to enjoy a level of material affluence unparalleled in human history.

The other two factors that accounted for the economic advancement of humanity were the institutional protection of the security of persons and property and the capacity to co-operate. Security of life and possessions provided a solid basis for production and accumulation.\textsuperscript{215} They also created the social conditions that fostered peace. As far as European nations were concerned, war was almost exclusively restricted to some of their overseas possessions—concretely, to the frontiers of civilization, those places in which there were still clashes with ‘savages’.\textsuperscript{216} The capacity of individuals to come together and join their energies for a common project was a third key element for the increasing creation of wealth.

It is worth noticing that Mill considered the three elements that contributed to the increase of human wealth as also distinctive features of civilized societies. For example, he stated that ‘the peculiar characteristic of … civilized beings, is the capacity of co-operation’.\textsuperscript{217} But if only advanced societies were in possession of the traits that generated economic progress, how could backward societies achieve the same result? Mill believed that this challenge was being overcome, as most nations were brought within the sphere of influence of the most advanced countries.\textsuperscript{218} Even those that were not moving forward were eventually to progress:

All the nations which we are accustomed to call civilized, increase gradually in production and population: and there is no reason to doubt, that not only these nations will for some time continue so to increase, but that most of the other nations of the world, including some not yet founded, will successively enter upon the same career.\textsuperscript{219}

Despite the positive effects of economic progress, Mill did not consider it a goal to be accomplished at all costs. Unlike most previous political economists such as Adam Smith, he believed that a stationary state, one without economic growth, was not necessarily negative.\textsuperscript{220} In fact, it could be a better state of affairs than his contemporary state of society, what he called ‘our present condition’.\textsuperscript{221} Mill defended

\textsuperscript{214} Ibid.
\textsuperscript{215} Ibid., §2 707.
\textsuperscript{216} Ibid.
\textsuperscript{217} Ibid., 707.
\textsuperscript{218} Ibid., §1 705.
\textsuperscript{219} Ibid., 706.
\textsuperscript{220} Ibid., Book IV Ch VI §2 754. This does not mean that for Mill accumulation was bad \textit{per se}. In fact, he affirmed that: ‘That the energies of mankind should be kept in employment by the struggle for riches … is undoubtedly more desirable than that they should rust and stagnate.’ Ibid.
\textsuperscript{221} Ibid.
economic stagnation, which apparently contradicted the logic of progress, based on the underlying distinction that he had always made between the two senses of the word civilization and, hence, of progress.\textsuperscript{222} It was clear for Mill that there was a higher social goal than further material accumulation.

In theory, the level of wealth enjoyed in affluent societies was enough to provide everyone a happy life. In practice, capital had accumulated in just a few hands, creating impoverishment, social inequality, and myriad social problems associated with them. This is why Mill believed that, as countries achieved a level of economic sophistication similar to that of England, the priority was redistribution rather than further growth.\textsuperscript{223} Whereas the latter contributed to civilization in a ‘narrow sense’, the former was in line with a higher conception of progress: human happiness. For Mill, ‘the best state of human nature’ was one in which ‘while no one is poor, no one desires to be richer’.\textsuperscript{224}

Unrestrained material advancement could potentially cause another major setback, one that is particularly important in evaluating the environmental implications of Mill’s thought. Unlimited human acquisitiveness could create an infinite incentive to modify nature to such degree as to strip it off its agreeable features.\textsuperscript{225} Mill did not think that economic growth in an advance society like England had already surpassed the limit of sustainability, but the risk was nevertheless real. In that hypothetical case, a stationary state in which nature was preserved from total degradation was preferable.\textsuperscript{226}

These remarks seem to be in tension with the ideas that Mill had expressed in his essay \emph{Nature}, in which he had treated the human-nature relationship from a diametrically different perspective. In this work he had affirmed with conviction that ‘the ways of Nature are to be conquered, not obeyed’.\textsuperscript{227} Nature was composed of negative attributes, destructive qualities as much as pleasant ones. The different ‘faces of nature’ explains Mills ambivalence. Mill’s admonition against ‘environmental’ destruction stemmed from an aesthetic preoccupation mixed with Malthusian anxiety. Besides, economic growth and its

\textsuperscript{222} See supra discussion at pages 274-275.
\textsuperscript{223} Mill, \emph{CW}, Vol III, Book IV Ch VI §2 754.
\textsuperscript{224} Ibid.
\textsuperscript{225} It is interesting to cite Mill in detail on this point: ‘Nor is there much satisfaction in contemplating the world with nothing left to the spontaneous activity of nature; with every rood of land brought into cultivation, which is capable of growing food for human beings; every flowery waste or natural pasture ploughed up, all quadrupeds or birds which are not domesticated for man's use exterminated as his rivals for food, every hedgerow or superfluous tree rooted out, and scarcely a place left where a wild shrub or flower could grow without being eradicated as a weed in the name of improved agriculture. If the earth must lose that great portion of its pleasantness which it owes to things that the unlimited increase of wealth and population would extirpate from it, for the mere purpose of enabling it to support a larger, but not a better or a happier population, I sincerely hope, for the sake of posterity, that they will be content to be stationary, long before necessity compels them to it.’ Ibid., 756.
\textsuperscript{226} Ibid.
\textsuperscript{227} Mill, \emph{CW}, Vol X, Nature, 381.
concomitant population growth threatened the possibility of experiencing solitude in the pleasant English
landscape, something that Mill particularly cherished.²²⁸ The destruction of the landscape was tantamount
to the destruction of the possibility of enjoying loneliness. Being alone, Mill affirmed, was necessary for
‘meditation’ and the formation of a solid character.²²⁹ Only in solitude could humans perceive ‘the beauty
and grandeur of nature’.²³⁰ This deep connection of humans with their surroundings reinvigorated the
mind and redounded in the good of society.²³¹ Industrialization threatened to destroy this possibility.

Mill’s own life experience influenced his aesthetic and ‘environmental’ concerns. His long walks in
solitude provided him a kind of mental gymnastics that refreshed his reason and energized his soul.²³² He
admired the orderly nature of the English countryside.²³³ It was this kind of landscape, which incarnated
the beauty of an already humanized nature, that he did not want to lose. Moreover, Mill forewarned about
the possibility of economic growth leaving nothing to the ‘spontaneous activity of nature’.²³⁴ It was this
extreme and gloomy prospect that triggered Mill’s protective attitude. Reconciling economic progress
and nature’s preservation before ‘every rood of land’, ‘every flowery waste or natural pasture’, ‘all
quadrupeds or birds’, and every ‘wild shrub or flower’ were destroyed in the name of higher productivity
still left ample space for a thorough use of natural resources. Only the total destruction of nature
demanded halting economic growth.

Mill’s defense of social equalitarianism and ‘environmental sustainability’ acted as a powerful
counterbalance to his belief in the desirability of economic progress. But there was an important spatial
exception that qualified his previous statements: economic growth was still desirable and utterly
necessary in backward countries. Similarly, most of the world’s natural frontiers had not yet been
conquered, and ample tracts of land were still vacant. Wilderness incarnated the kinds of imagery of
African and Pacific regions that Mill’s childhood tales of discovery had imprinted in his mind. Non-
European societies were stagnant, and nature in those societies had yet to be squeezed sufficiently enough
so as to create the material conditions that permitted reaching the threshold of civilization. For example,
China—one of the most advanced non-European societies—was in a state of ‘permanent halt’.²³⁵ For that

²²⁸ Mill, CW, Vol III, Book IV Ch VI §2 756.
²²⁹ Ibid.
²³⁰ Ibid.
²³¹ Ibid.
²³³ For his description see Ibid., 456-457.
²³⁴ Mill, CW, Vol III, Book IV Ch VI §2 756.
²³⁵ Mill, CW, Vol XIX, Considerations, Ch II 396.
reason, it was of outmost importance to instill economic motion into the dormant social structure of those countries.

The simplest recipe for healing the economic malaise that pervaded backward societies was to increase production by exciting the desire for accumulation.\(^{236}\) This desire had to be implanted deeply into the consciousness of individuals. By infusing the need to have more possessions in peoples’ minds, their psychological structure could be affected and, hence, the wheel of progress could be moved from within backward societies. But in order to accomplish that change there were first a series of encompassing economic and political reforms that had to be undertaken. To start with, better government was needed, which for Mill meant one that protected private property, moderated taxes, and redistributed land.\(^{237}\) In addition, collective intelligence had to increase. The way to do so was by eliminating the superstitious beliefs that hindered productivity, and stimulating and driving mental activity toward ‘new objects of desire’.\(^{238}\) Finally, foreign technology and capital were required in order to foster productivity and propel the economy.\(^{239}\)

It is important to bear in mind that these economic and political prescriptions applied only to most Asian nations and to the ‘less civilized and industrious parts of Europe’.\(^{240}\) Mill inherited from his father the conviction that different social states had to be treated differently, in the sense that the degree of social development of a particular community was a crucial factor in order to determine the most suitable institutions and form of government.\(^{241}\) The best government was one adapted to the state of advancement of a particular society, which was also capable of carrying a people to the next stages of progress.\(^{242}\)

But how could a backward society produce individuals with the genius, skill, and competencies required to carry out such a dire and thorough transformation? Backward societies would naturally tend to produce backward individuals. Mill made clear the distinction between self-improving nations and un-

\(^{237}\) Ibid.
\(^{238}\) Ibid.
\(^{239}\) Ibid., 186-187.
\(^{240}\) Ibid., 187.
\(^{242}\) John Stuart Mill, *CW*, Vol XIX, Ch II 396-398. Mill first defined the best government as that which could carry ‘a people to the next stage of progress’, Ibid., 396. But that was not enough. A given form of government could help a society climb one step of the ladder of social evolution merely to remain stagnant thereafter. So, in defining the best government, one had to take into account ‘not only the next step, but all the steps which society has yet to make’. Ibid., 397.
improving ones.\textsuperscript{243} He even maintained that due to the despotism of custom ‘the greater part of the world’ had ‘properly speaking, no history’.\textsuperscript{244} How then to break this vicious cycle of backwardness that kept societies motionless and off the tracks of history? One possibility was the rise of a virtuous king. However, as Mill acknowledged, that was a rare occurrence.\textsuperscript{245} There was a short leap from the conviction of the almost impossibility of endogenous social change to the conclusion that the only alternative for the betterment of backward societies was the possibility of being governed by foreign more advanced polities. That was precisely what Mill recommended.\textsuperscript{246} Despotic rule had been historically important in bringing about social improvement.\textsuperscript{247} Thus, imperial rule was a necessary evil for the sake of human progress.

The standard to judge whether foreign rule was positive or negative was its competence to adapt to the social state of the particular polity it administered. This is why Mill’s stadial theory remained important in the context of British imperialism. Savage societies could not be brought within the pale of civilization using the same economic and political recipes than those applied to semi-civilized countries. For instance, Mill recommended free trade for the civilization and economic development of semi-civilized countries,\textsuperscript{248} but in the unoccupied parts of the Earth, where savages like the peoples of Australia still lived, his prescriptions were rather different: migration and colonization.\textsuperscript{249}

The world of savages was also a world of wilderness. On some occasions Mill used that specific word to describe the habitats of hunting-gatherer communities.\textsuperscript{250} More often he employed terms such as


\textsuperscript{244} Mill, \textit{CW}, Vol XVIII, On Liberty, Ch III 272.

\textsuperscript{245} Mill, \textit{CW}, Vol XIX, Ch II 419.

\textsuperscript{246} In \textit{Considerations} Mill stated: ‘Then, indeed, the rulers may be, to almost any extent, superior in civilization to those over whom they rule; and subjection to a foreign government of this description, notwithstanding its inevitable evils, is often of the greatest advantage to a people, carrying them rapidly through several stages of progress, and clearing away obstacles to improvement which might have lasted indefinitely if the subject population had been left unassisted to its native tendencies and chances.’, ibid. A similar view can be found in \textit{Non-Intervention}: ‘ … nations which are still barbarous have not got beyond the period during which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners’, Mill, \textit{CW}, Vol XXI, 118. See also Mill’s declaration in \textit{On Liberty} that ‘Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually affecting that aim’, Mill, \textit{CW}, Vol XVIII, Ch I 224.

\textsuperscript{247} Mill, \textit{CW}, Vol XIX, Ch IV 416.

\textsuperscript{248} Mill, \textit{CW}, Vol III Book IV Ch II §1 711.

\textsuperscript{249} Ibid. The strong bond between free commerce and civilization is also visible in Mill, \textit{CW}, Vol XXI, 116. The differences between Mill’s approach toward India and settler colonies have been recognized in Katherine Smits, ‘John Stuart Mill on the Antipodes: Settler Violence against Indigenous Peoples and the Legitimacy of Colonial Rule’ 54 \textit{Australian Journal of Politics and History} (2008) 1-15. See also Bell, ‘John Stuart Mill’, 35.

unoccupied lands,\textsuperscript{251} unoccupied parts of the earth,\textsuperscript{252} unoccupied continents,\textsuperscript{253} unpeopled continents,\textsuperscript{254} uncultivated or ill-cultivated regions of the world, waste lands,\textsuperscript{255} etc., which conveyed the same idea of a vacuum to be filled. These empty spaces comprised an economic emptiness in the form of unutilized or underutilized natural resources waiting to be occupied and put into use, and a civilizational vacuum that required the construction of an advanced civil society.

The reference to the lack of economic exploitation of the land and the lack of agriculture or its deficient nature is reminiscent of theoretical arguments used by Locke in North America during the seventeenth century. For Mill, virgin portions of the world and those that had not been intensively utilized had yet to be tamed, exploited, and civilized. He shared with Locke the belief that private property on land was related to labor and improvement. Explaining the origin of landed property, Mill affirmed that although ‘no man made the land, men, by their industry, made the valuable qualities of it; they reclaimed it from the waste, they brought it under cultivation, they made it useful to man, and so acquired as just a title to it as men have to what they have themselves made’.\textsuperscript{256} According to Mill’s view, and carried by the British colonists, in the wilderness of Australia the improvement and privatization of the land went hand in hand.

Mill’s economic and civilizing program for settler colonies fused in his plan to found the colony of South Australia. British surplus capital and population could find a suitable exit in faraway pristine lands.\textsuperscript{257} State sponsored colonization could alleviate social pressure at home while providing the best foundation for the construction of a new civilized society in a corner of the world which had been so far underutilized and thus held ‘vast productive resources’.\textsuperscript{258} Importantly, Mill conceived the exploitation of Australia’s natural resources as a cosmopolitan program connected with the promotion of ‘the economic interest of the human race’\textsuperscript{259} and designed to increase the ‘produce of the world’.\textsuperscript{260}

\textsuperscript{251} Ibid., Book V Ch X §1 921.
\textsuperscript{252} Ibid., Book IV Ch II §1 711; Book V Ch XI §14 963.
\textsuperscript{253} Ibid., 967.
\textsuperscript{254} Mill, \textit{CW}, Vol II Book I Ch XIII §4 194.
\textsuperscript{259} Mill, \textit{CW}, Vol III, Book V Ch XI §14 963.
British colonies provided a blank political and physical space in which to build an economically sound and polished society from the scratch, meaning one that avoided the several pitfalls that troubled British society, which prevented the full realization of human happiness. In Mill’s own words:

Like the Grecian colonies, which flourished so rapidly and so wonderfully as soon to eclipse the mother cities, this settlement will be formed by transplanting an entire society, and not a mere fragment of one. English colonies have almost always remained in a half-savage state for many years from their establishment. This colony will be a civilized country from the very commencement.261

The establishment of a colony in the ‘desert’ required thorough economic, social, and political engineering.262 There were several challenges to this utopian social dream.263 One of the perils was the possibility that the colonies reverted to a condition of savagery/barbarism if unsuitable economic policies were implemented. Having ‘a scattered population of settlers in the wilderness’ was something to be avoided at all costs.264 If colonists dispersed too rapidly and appropriated excessive land the new project was doomed to end up in fiasco.265 From the very outset the new society would suffer a loss of productive power and a delay in the attainment of ‘wealth and civilization’.266 The external wilderness of the natural world was an ever-present menace to human nature: either the colonists tamed it and imposed their civilization on the supposedly pristine landscapes of Australia, or those wild habitats could awake in them the savage traits that lay dormant under the civilized influence of their metropolitan upbringing.

It is noteworthy that in Mill’s early writings about the Australian colonies there was almost no mention of the pre-colonial population of Australia or their societies.267 All allusions to Australia referred to the new colonial society in formation. Mill’s ambitious vision of transplanting an entire society to South Australia presupposed the absence of an analogous social formation in Australia upon which the


262 Ibid., 740.

263 Bell argues that Mill saw colonies as ‘laboratories of character development’. Moreover, for Mill ‘Systematic colonization offered the opportunity to create new progressive political communities, populated by industrious, confident, democratic people’. See Bell, ‘John Stuart Mill’, 46.


266 Mill, CW, Vol III Book V Ch XI §12 958.

267 The only time in which Mill referred to the pre-colonial population of Australia was in the context of a reflection about the position of women in ‘primitive’ tribes. In this backward social state ‘women were and are the slaves of men’ when it came to work. This was exemplified by the contrast between the idleness of the Australian savage and the hard working women who picked roots for him. See Mill, CW, Vol XXI, Appendix C, Enfranchisement of Women (1851), 406.
experiment of founding a new colony would have impacted. There was no social space in South Australia prior to the arrival of British settlers, only a wild physical space that had to be physical conquered before it could be civilized.

The violent clash between the new comers and the former population of Australia was totally absent from Mill’s early writings and his description of the possible challenges presented by colonization. The invisibility of the peoples of Australia was conspicuous. For instance, when Mill examined the different types of dependencies, he distinguished between overseas territories composed of people at a great distance from the degree of civilization of the metropolis such as India, and those like Australia in which the colonial population had the same degree of civilization than the ruling country. The peoples of Australia were not included within the population that counted as inhabitants of the lands that used to be their territory.

Despite an early lack of attention to the plight of the peoples of Australasia, Mill became more attuned to colonial violence in the later part of his life. He denounced the excesses committed by British colonists and settlers. This change of attitude coincided with a general modification of his position in regards British rule over non-European peoples. Several violent incidents in the British Overseas Territories, such as the Indian Mutiny and the Governor Eyre controversy in Jamaica to which the British authorities had responded with stern force, had brought to light the violence that often accompanied British rule. The revolts against British power in India and New Zealand had also affected the perception of non-European peoples in Britain and, consequently, their place within the Empire. It was no longer clear that they could be peacefully brought into civilization.

In spite of a certain shift, and in opposition to it, Mill remained loyal to his political prescriptions for indirect expert rule over colonial affairs. But reality of Empire proved recalcitrant, inflicting a big blow

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268 Bell argues that violence in Australia would have exposed Mill’s colonial romance. Hence, Mill preferred to ignore it, despite being aware of it. See Bell, ‘John Stuart Mill’, 53 and note 94. Smits has interpreted Mill’s silence in regards to the peoples of Australia differently, as a consequence of his dislike of missionary activity and the belief that the pre-colonial population was extinguishing. See Smits, ‘John Stuart Mill: On the Antipodes’, 6. For the history of the latter belief see Patrick Brantingler, Darks Vanishing: Discourses on the Extinction of Primitive Races, 1800-1930 (Ithaca, Cornell University Press, 2003). Darwin acknowledged the fatal effect of the clash between civilized nations and savages and barbarians. See Charles Darwin, The Descent of Man (New York, D. Appleton and Company, 1871) 229. His analysis was part of a large literature on the extinction of non-European peoples that started at the end of the eighteenth century and which carried its influence well into the nineteenth century.

269 Mill, CW, Vol XIX, Ch XVIII 562.

270 This incident refers to the bloody repression of an alleged insurrection of free black peoples in Jamaica ordered by Edward John Eyre, the Governor of the Island, in 1865. The influence of this episode on Mill’s colonial thought is explored in depth in Kohn and O’Neill, ‘A Tale’, 213-221. See also Smits, ‘John Stuart Mill: On the Antipodes’, 9-12. See also Mill, CW, XVI, letter to William Sims Pratten, June 9 1868, 1410-1411.

on the feasibility of Mill’s imperial approach and the legitimacy of British rule overseas. Violent authoritarianism in the name of order was exactly the opposite of his vision of enlightened colonial administration in the name of progress. But order and progress were not incompatible—it was the means to attain order in the colonies that had gone ashtray. As always, the elder Mill firmly believed that law and justice remained the foremost appropriate foundations of ‘order & civilization’.  

There was more than one reason for Mill’s disenchantment with certain aspects of the British Empire. First of all, there was the economic setback that colonies had become increasingly protectionist, against Mill recommendations. A second element of contention was the power of colonial governments to decide about the apportioning of unoccupied land, something that had hindered their potential for economic advancement. Had the lands remained in the hands of the Crown, as Mill had advised, the outcome would have been more favorable. Finally, there was the issue of harsh treatment of the subject populations.

Even though Mill never presented his criticism in his printed work, in his private letters he complained about the attitude of colonists and settlers in respect of the colonized populations. Concretely, in a letter written to Henry Samuel Chapman he denounced that the colonists’ avidness for land created a potential irresolvable conflict with the Maoris. Settlers’ disregard for ‘the rights and feelings of inferiors’ usually ended in abuse. In the case of New Zealand, he was unsure whether, left to the sole power of the colonists, that scenario was bound to take place. Perhaps the wars of resistance against British occupation launched by the Maoris had contributed to increasing the esteem in which the British held them, something that could have prevented abuse and mistreatment. If that was the case, there was no need for metropolitan interference with the colonists’ self-government in New Zealand. And he went on to comment that if the colonists of New Zealand managed to protect the Maoris, they would prove to be

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272 Mill, CW, XVI, 1411.
273 This disenchantment is what Bell has labelled melancholic colonialism. See Bell, ‘John Stuart Mill’, 37.
274 Ibid., 52.
276 Mill, CW, Vol XVI, letter to Henry Samuel Chapman, Jan. 7 1866, 1136. The only way the conflict could be avoided, Mill stated, was if the progressive reduction of Maori population ended up in their complete extinction. Ibid.
277 Ibid.
278 Ibid. A similar statement can be found in the same volume, in a letter written later in the summer of 1866 to Robert Pharazyn. See Ibid., letter to Robert Pharazyn, Aug. 21 1866, 1196. Interestingly, in this letter Mill asserts that if the New Zealand colonists are unjust with the Maoris, the British will be unable to protect them. Ibid.
279 Ibid., letter to Chapman, 1136.
different to the ‘common English abroad’ who often resorted to tyranny and injustice ‘over what they call inferior races’. 

In places like Australia, where the original inhabitants were barely more advanced in terms of civilization than wild beasts, a progressive society had to be created from scratch. In the habitats of Australia, nature and pre-colonial populations fused. Both had to be transformed and improved. Ecosystems were the point of entry for that program of progress. Colonists had to exploit them and transform the backward populations of the earth into efficient individuals equally capable of exploiting nature effectively.

Mill believed that—instilled with negative qualities—wild nature had to be amended by human knowledge and technology. In the same way, human nature ought to be guided by education. As he put it:

In the times when mankind were nearer to their natural state, cultivated observers regarded the natural man as a sort of wild animal, distinguished chiefly by being craftier that the other beasts of the field; and all worth of character was deemed the result of a sort of taming … The truth is that there is hardly a single point of excellence belonging to human character, which is not decidedly repugnant to the untutored feeling of human nature.

Savages incarnated the untamed wilderness of human nature. They had few virtues. Those traditionally attributed to them, like veracity, were a myth. ‘Savages are always liars’, Mill affirmed. And those qualities that they did possess, like courage, were the result of education rather than inherent merit.

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280 Ibid. In the same volume see also letter to Robert Pharazyn, 1196. See also Mill, CW, XVII, letter to A.M. Francis, May 8 1869, 1599. In this letter Mill affirmed that ‘the common English abroad … are intensely contemptuous of what they consider inferior races, & seldom willingly practice any other mode of attaining their aims with them than bullying & blows.’ This statement was made in the context of a debate about the convenience of recruiting Polynesian labourers to Australia. Mill opposed that idea of recruiting them (but he welcomed them coming spontaneously) because he believed that no law could possibly ‘protect ignorant and uncivilized strangers’ (the South Sea Islanders) from ‘abuses of power’ committed by their English masters. The experiment could perhaps work if those imported were Chinese, as they made ‘themselves very unpleasant to those who ill-treat them’. In the same volume Mill wrote to Charlotte Speir Manning, an Indian scholar, to congratulate her for her book Ancient and Medieval India, which according to Mill ‘could inspire greater respect for the people of India in the minds of those who are appointed to govern them’. She had revealed a great deal of hidden knowledge about the ‘thoughts & intellectual productions of the Hindoos’. Still, Mill did not believe that the new data on Indian society would necessarily mean its upgrade on the scale of social advancement. As he noted, ‘opinions will differ as to the merits of these productions, & of the state of civilization which they indicate’. See Ibid., letter to Mrs. Charlotte Speir Manning, Jan 14 1870, 1686-1689.


282 He noted for instance their lack of self-control. See Ibid., 395.

283 Ibid.

284 Mill introduced an important caveat when referring to savage courage, noting that that quality ‘was occasionally though by no means generally found among tribes of savages’. Ibid., 393.
John Stuart Mill’s approach to imperialism evolved over time. While he remained silent to the suffering and violence that accompanied British expansion in his early writings, his growing awareness of abuses of power over non-Europeans gave rise to a more critical approach to discussions concerning global and colonial affairs in the later part of his life. The rapacity of the colonists put into question the whole colonial edifice and its cosmopolitan goal of redeeming and bettering humanity, demanding a response from somebody like the elder Mill who still believed in the possibility of human progress. In the 1860s he maintained that his age was one ‘in which many great improvements in human affairs have really been made’.  

The last period of his life was also one in which intellectuals like him witnessed the opening of ‘new paths’. As human power over nature increased, great transformations were modifying the face of the Earth. In a revealing passage Mill foreshadow the possibility that in a not so distant future human power over nature on a global scale may reach its limit:

The very idea of anything impassable and impenetrable is almost too charming, now when every nook and corner of our planet has got or is getting opened to the full light of the day. One of the many causes which make the age we are living in so very important in the life of the human race—almost, indeed, the turning point of it—is that so many things combine to make it the era of a great change in the conceptions and feelings of mankind as to the world of which they form a part. There is now almost no place left on our own planet that is mysterious to us, and we are brought within sight of the practical questions which will have to be faced when the multiplied human race shall have taken full possession of the Earth (and exhausted its principal fuel).

This passage evidences an ambivalent tone in Mills’ views with regard to nature. On the one hand, the idea of pristine nature and virgin place of wilderness was charming. Here again one can perceive Mill’s aesthetic appreciation of nature. On the other hand, the fact that habitats that had been previously untouched by any people—or so he thought—had been finally humanized worldwide was described through a metaphor that conveyed the idea of wilderness as a dark, closed realm that had finally been

286 Ibid.
288 The beginning of this quote followed a reference to New Zealand’s Middle Island, the nineteenth century name for what is today known as South Island. In a letter to Samuel Chapman, one can feel Mill’s longing for the virgin mountainous landscape of the island. He wrote: ‘Your account of the Middle Island and its impassable range of high Alps, is very attractive to me, and if New Zealand were an island in the Northern Atlantic, would speedily send me on a visit there.’ Ibid.
pierced and, hence, opened to the ‘full light’ of civilization—what he called ‘the day’. Finally, Mill pointed out the challenging balance between world population and the natural resources at its disposal. It is interesting that he characterized that question as a practical one, instead of an ethical one. Perhaps further management and technology could resolve the thorny question of the human relationship to nature in an age in which more than ever before the environmental limits of the world were a foreseeable reality. It seemed certain for Mill that, as the end of the nineteenth century approached, one age, in which the world was yet imbued with mystery, had passed, never to come again. Paradoxically, the opening of the interior of Africa was soon to reveal a novel wilderness, myriad mysteries, and further natural frontiers for imperial powers to control and exploit.

*International lawyers, vacant territory, and savages (1800-1850)*

At the end of the eighteenth century, and despite nuances in the formulation of conjectural history, most authors shared a cluster of ideas about how societies transitioned from a backward to an advanced social state. In the context of European imperialism, those ideas were used to legitimize the universalization of legal institutions that allowed the privatization and commodification of nature in non-European territories. Additionally, they provided the intellectual justification for the transfer of ecosystems and their constitutive natural elements—or as the colonists predominantly perceived them: natural resources—from non-European societies to the colonists.

There was no systematic treatment of stadial theory in the international legal texts of the first half of the nineteenth century. Actually, several treatises on international law289 (a term that came progressively into wider use after Bentham’s first coined it) did not even refer to the four social stages of classical stadial theory. However, almost all of them analyzed the right of ‘civilized’ nations (a category that included European colonial powers and the U.S.) to occupy ‘vacant’ territory populated by backward communities, which they predominantly characterized as savages. So, there was a debate about the doctrine of occupation, its definition, and scope.

Although most commentators on international law shared the idea that it was legitimate for civilized nations to acquire vacant land, and defined occupation in similar terms, each author offered a slightly different angle to that discussion. Scholars’ perspectives were influenced by diverse factors such as

289 During the first half of the nineteenth century the terms ‘international law’ and ‘the law of nations’ were often used interchangeably. In this section, I will use the term international law, while respecting the terms that commentators used in their own works.
nationality, religiosity, and ideology. In general, commentators who belonged to imperialist nations were more inclined to legitimize the occupation of non-European territories than scholars who belonged to states which had no colonial ventures.290

So even as stadial theory receded from the fore of legal discussions on international law, it was evident that most commentators shared a framework through which they conceptualized non-European societies that was informed by a progressive understanding of history which resembled that of conjectural history. Assumptions about European and non-European societies derived from conjectural history were so embedded in the intellectual milieu of the time that the categories of savagery and civilization became naturalized. Even those authors that were not well versed in or subscribed to stadial theory used those categories. In particular, the category of savage gained its own traction and, even separated from the progressive philosophy of history from which it had come into life, it continued legitimizing European imperial sway over nature and non-European populations alike.

Conjectural history still resonated in some of the legal international texts at the turn of the nineteenth century. One of the authors that referred more explicitly to progressive history was Robert Plumer Ward (1765-1846). Ward wrote *An Enquiry into the Foundation and the History of the Law of Nations in Europe*, which is regarded as a pioneer effort at writing a history of international law.291 From the outset of his work, Ward attempted to prove that the law of nations could not be conflated into the law of nature. The transformation of the law of nations throughout history already seemed to contradict the supposed immutability of natural law.292 Moreover, even the duties of mankind that the law of nature prescribed varied significantly. For Ward, the history of mankind showed that each society, whether savage or civilized, had different sets of beliefs and practices regarding moral obligations.293

The heterogeneity of practices characteristic of civilized societies already constituted a solid proof of the lack of universal duties.294 But, for Ward, nothing could dispel the belief in the immutability of moral practices more than looking at ‘the frightful picture of deformed humanity’ that was savage life.295

Looking at the temporal mirror of savage life, one could see the deformity of pristine and raw human

290 In this sense, Fitzmaurice claims that German jurists were able to look at the phenomenon of European imperialism more ‘dispassionately than many of their English and French colleagues’. See Fitzmaurice, *Sovereignty*, 219.


293 Ibid., Ch II 71.

294 Ibid., 79.

295 Ibid.
nature directly. For Ward, the savage state was the most unfortunate in which humans had ever lived, one in which even the most basic moral rules were generally disregarded.

Ward framed his analysis of universal moral obligations in a stadial mold, contrasting the savage and civilized or cultivated states. Even though he did not describe any of these states in-depth, he provided several hints of the backwardness of savages. For instance, he explained that the ‘naked and solitary Indian’ who lived in a savage nation such as the ‘North American Indians’ feared natural forces and praised the sun and the moon. The worship of nature was a recurrent point in the characterization of savages as backward. For Ward, as for Acosta and James Mill, among others, savages’s reverence for nature was a clear sign that they had not gained ascendancy over the natural realm. In modern Europe things were different: science had disclosed nature’s secrets, allowing humans to claim their superior place and ascendancy vis-à-vis non-human nature. Considering non-human nature as sacred revealed the inferiority of North Americans. Worshipping what was inferior was the most definite proof of inferiority.

After having carried out an examination of the diverse practices of different human societies, Ward could reasonably conclude that the relations between commonwealths had been historically characterized by the same degree of variance. As there was no universal law of nations, the only way to know what really constituted the law of nations was to look into the practices that had regulated the intercourse of different commonwealths at different historical junctures.

The first period of the law of nations in Europe that Ward delineated was that of the Greeks and the Romans. One of the aspects to which Ward referred in his discussion of that period was the more humane practices toward war prisoners that the Romans professed in comparison to the Greeks. He mentioned Dr. Falconer’s opinion that the disparity of behavior between both polities had to do with the larger need for land characteristic of the savage and the shepherd states (Greeks), in contrast to the agricultural stage (Romans). Ward disagreed with Falconer’s depiction of the Greeks as shepherds. The fact that they practiced agriculture and were skillful merchants demonstrated that they had advanced from the savage state. What is more, the stature and prestige of Greek’s arts and sciences were in stark contrast with

296 Ibid.
297 Ibid., 81-85.
298 Ward used the terms ‘civilized’ and ‘cultivated’ state of society indistinguishably. See, for instance, Ibid., 80.
299 Ibid., 101. Ward mentioned the North American Indian nations in Ch IV 139.
300 Ibid., Ch VI 196.
301 Ibid., 197.
the absence of science in the savage and shepherd states.\textsuperscript{302} Arts and sciences could only flourish in a society in which sophisticated productive practices provided food with ease, leaving time for leisure.\textsuperscript{303}

Ward did not translate his adherence to a progressive philosophy of history based on a society’s mode of production into a legitimization of the territorial displacement of savages. Actually, he was critical of European colonialism, contrasting for example the fairness of the Pennsylvanian Quakers who signed treaties with ‘the Indians’ to the oppression and enslavement of South American peoples under the pretense of Spanish evangelization.\textsuperscript{304} Ward acknowledged that there were different kinds of nations that differed in their social advancement. In his opinion, savages even formed nations, that is, social and political bodies with their own laws and customs.\textsuperscript{305} He noted that the ‘Shepherds, Husbandmen and Merchants’ all had ‘a different law of nations’.\textsuperscript{306}

This pluralism was irreconcilable with the colonial practices of European powers such as Spain and England. They had taken possessions of lands in blunt disregard for the entitlements of the original inhabitants.\textsuperscript{307} ‘Who among us’, he complained, would not have felt ‘indignation where a fleet of ships from some part of the Globe, hitherto unknown, (if such there be) to arrive to Europe on discoveries, and pretend to spoil us of our goods, or take possession of our territory upon the authority of similar patents?’\textsuperscript{308}

Ward’s critique of European land acquisition in the colonies anticipated other nineteenth-century critical voices who pointed out the unethical basis of European colonialism. Still, his defense of European treaties with North Americans and his aversion to savage life may indicate the existence and possibility of other more palatable ways of founding colonies abroad.\textsuperscript{309}

Another author that gave some preeminence to stadial theory in his writings was William Oke Manning (1809-1878). Several decades after Ward, Manning authored the first general British book on international law, \textit{Commentaries on the Law of Nations}.\textsuperscript{310} Published in 1839, Manning’s treatise dealt mainly with the question of war.

\textsuperscript{302} Ibid., 198.
\textsuperscript{303} Ibid., 198-199.
\textsuperscript{304} Ibid., Ch IV 145-146.
\textsuperscript{305} Ibid., 139.
\textsuperscript{306} Ibid., 138.
\textsuperscript{307} Ibid., Vol II Ch XIII 112-115.
\textsuperscript{308} Ibid., 116.
\textsuperscript{309} In this sense see Walter Rech, ‘International Law, Empire and the Relative Indeterminacy of Narrative’ in Martti Koskenniemi, Walter Rech, and Manuel Jiménez (eds.), \textit{International Law and Empire: Historical Explorations} (Oxford, Oxford University Press, 2016) 75-107, 94-95 (forthcoming December 2016).
For Manning, the law of nations or international law (he mentioned both names but preferred to use the first) was the scientific discipline that regulated intercourse between different nations. According to him, the law of nations had three different sources. One of them was the law of nature, which he equated to the will of God. The other two, customs and conventions, formed together the positive law of nations. Unlike natural law, these sources did not emanate from Divine law, but rather from tacit or expressed human compact. It was in his treatment of one of the ‘positive’ sources of the law of nations, namely customary law, that Manning used conjectural history.

For Manning, customary law was by definition based on the usages and practices of nations in the past. Nations and societies were in constant improvement, advancing toward a ‘civilized state of society’. As nations advanced in civilization, they faced the dilemma of having to respect practices of a less advanced historical period. Manning dismissed this obstacle, explaining that as nations climbed the ladder of civilization they substituted the limited usages of an ‘imperfect state of society’ for better ones. Social and legal progress went hand in hand. This positive association not only affected customary law. The advance of civilization had, for example, also brought about more humane regulations of international warfare. For Manning, this later change had come about largely due to the benefits of Christianity. In fact, he believed that ‘law, and civilization, and religion’ had all progressed at the same pace.

Manning used his own nomenclature to refer to the social stages through which societies transitioned from backwardness toward civilization. His categories resembled those of John Stuart Mill. He distinguished between savagery, barbarism, and civilization. He also referred to a semi-civilized period. These periods were not necessarily linked to concrete social states and the productive activities that characterized them, and their generality allowed Manning to use them interchangeably.

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311 Ibid., Book I Ch I 1-3.
312 Ibid., Book II Ch I 58.
313 Ibid., Book II Ch II 67.
314 Ibid.
315 Ibid., 69.
316 Ibid., 70.
317 Ibid.
318 Ibid.
319 Ibid., Book III Ch VII 144-145.
320 Ibid., Book II Ch II 73.
321 Ibid., x; Book I Ch I 8, 14; Book II Ch II 69; Book III Ch I 104; Book III Ch VIII 155.
322 The terms ‘barbarian’ and ‘savage’ were both related to the cruelty of war. See Ibid., Book III Ch VIII 155-156.
barbarism, for example, could mean at times a general absence of civilization rather than a historical period in which a society lived from pastoralism.\footnote{Manning mentioned ‘the first ages of barbarism’, implying the possibility of a division of this general period. See Ibid., Book IV Ch X 334.}

As with Ward, Manning’s use of categories characteristic of stadial theory did not translate into a straightforward defense of European imperialism. In fact, it is difficult to know whether he considered savage or barbarian nations to be part of international law. When he discussed the treatment of prisoners it seemed that barbarians and savage nations had their own usages.\footnote{Ibid., Book III Ch VIII 155-156.}

This confusion stemmed from the fact that Manning used these terms to refer to different temporalities within the European context, as well as to the social state of non-European communities. In this sense, the Middle Ages were characterized as barbaric times in which there were few customary usages that belonged to the law of nations. He also used the term ‘savage tribes’ to refer to human communities contemporary to his own who still lived in a backward state.\footnote{Ibid., Book II Ch II 69.} He explained that their practices of war violated the laws of nature and thus could not be considered as part of the customary law of nations.\footnote{Ibid.}

What is more, Manning believed that there was no notion of a law of nations in Greek times. He compared the Greeks to the Iroquois of North America, noticing nonetheless that, according to Montesquieu, the latter had some resemblance of law when it came to the treatment of ambassadors of other tribes.\footnote{Ibid., Book I Ch I 7.} But again, Manning’s conviction that savages did not have laws was not carried to its end point, and remained silence as to their rights over the territories they inhabited.

In the middle of the nineteenth century, stadial theory reappeared (for the last time) in the work of the Scottish lawyer James Reddie (1775-1852). Reddie studied at the Universities of Edinburgh and Glasgow, where he attended law lessons with highly reputed intellectuals of the Scottish Enlightenment Dugald Stewart and John Millar.\footnote{John W. Cairns, ‘Reddie, James (1775–1852)’ Oxford Dictionary of National Biography (Oxford University Press, 2004) [http://www.oxforddnb.com/view/article/23242, accessed 24 June 2015]. Millar had produced one of the most important works of the late eighteenth century on conjectural history. In fact, according to James Mill, Millar’s The Origin of the Distinction of Ranks was the last contribution to the genre. See supra page 259.}

James Reddie wrote a general treatise on international law entitled Inquiries in International Law Public and Private, first published in 1842.\footnote{I will use a later version of the text, namely James Reddie, Inquiries in International Law Public and Private (Edinburgh, William Blackwood and Sons, 1851).} Like Manning, he defended the status of international law as a science, the object of which was the regulation of the intercourse between autonomous entities called...
states. This definition of international law did not mean that Reddie considered positive law the only constitutive part of the body of international legality. Again, as with Manning, who had also followed Wheaton in this point, Reddie maintained that international law was integrated by the natural law of nations and the positive law of nations.

For Reddie, one of the key elements for understanding the origin of the law of nations was the productive activities that each nation employed to procure subsistence. In other words, the natural law of nations adapted to different stages of social advancement. A progressive philosophy of history and its terminology permeated Reddie’s work. Terms such as ‘rude state’, ‘rude stages of society’, ‘civilized state’, ‘less civilized nations’, ‘barbarous times’, ‘all stages of society’, ‘progressive improvement’, ‘progress of civilization’, etc., abounded in his writings. Despite his adherence to stadial theory, Reddie, like James Mill, maintained that a society that subsisted exclusively from agriculture was in a rude stage. A nation was progressive only when it combined agriculture with manufactures and trade.

Reddie’s classification of nations according to their degree of civilization did not excluded the less advanced from the realm of law. In fact, he exhibited a certain pluralism, admitting that the international law of civilized nations was as natural as that of rude ones. But the parity of civilized and rude nations worked only with regard to the natural law of nations. It was clear that the modern and advanced nations of Europe excelled all others when it came to the development of a practical body of international regulations. It was then only natural that the body of positive international law adopted by the most civilized European nations was eventually adopted by the less civilized ones.

The progressive nature of James Reddie’s conception of international law, unlike that of Ward, had a direct influence on his views on European expansionism. For Reddie, the colonization of overseas territories and the acquisition of uninhabited territories was a natural corollary of nations’ inherent right of amelioration. One of the constitutive elements of a nation was its property over a defined territory. Bodies of people had historically grouped together into states with the purpose of occupying and

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330 Ibid., Ch I 4-5.
331 On Wheaton, see infra discussion at page 312. Reddie, Inquiries, 5-6.
332 Ibid.
333 Ibid., Ch I Sect. V 54.
334 See, for instance, Ch I Sect. III 19, 20, 21; Ch II 127, 128; Ch III 140, 141, 144, 147.
335 Ibid., Ch II 128.
336 Ibid.
337 Ibid., 127. See also Ch III 144.
338 Ibid., Ch III 145.
339 Ibid., 147.
340 Ibid., Ch V Sect. III Sub-Sect. II 195.
cultivating ‘a portion of the earth’.\textsuperscript{341} Property over land distinguished nations from wandering tribes and hordes.\textsuperscript{342} It also justified their dispossession. In consequence, Reddie maintained that unsettled tribes could not protect a right—that of private property—of which they had no notion.\textsuperscript{343}

Unlike Ward, Manning, and Reddie, other British writers of the first half of the nineteenth century, like Polson, Wildman, and Phillimore, did not feature conjectural theory prominently in their works. But all these later authors had something to say, however, about the legality of the acquisition of territories inhabited by ‘savages’. They all justified colonialism and placed the exploitation of nature at the center of their legal arguments. By mixing stadial theory and the agricultural argument they buttressed European occupation of non-European territory. In so doing, they routinely referred back to Vattel’s formulation of the agricultural argument. But while they unanimously declared the legality of European occupation overseas, most of them also criticized its immorality and/or set certain kinds of limits to treatment of non-European populations and the territorial extent of occupation.

One of the most critical authors was Arthur Polson, who in 1848 published \textit{The Principles of the Law of Nations}, a book that unlike its precedents advanced a positivist conception of the law of nations.\textsuperscript{344} The positivist outlook of Polson’s conception of international law did not totally exclude natural law, however; in fact, he affirmed that the law of nations was predominantly based on natural law.\textsuperscript{345} The law of nations acted as a filter for natural law, modifying and enforcing the latter according to its own ‘sanctions’.\textsuperscript{346}

Polson shared with contemporary international legal scholars a belief in progress and civilization. In the same manner as previous British jurists, he opened his book on the law of nations by delineating a history of the discipline. From the outset, he affirmed that the law of nations was ‘a result of a state of comparative civilization’.\textsuperscript{347} The law of nations was the result and the guarantee of the benefits that civilized nations derived from their intercourse, chiefly by commerce.\textsuperscript{348} The law of nations developed as civilization progressed.\textsuperscript{349} Like Manning, Polson believed that the humanization of the laws of war was indebted to the ‘progress of civilization’ and a purer ‘spirit of religion’.\textsuperscript{350}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{341} Ibid., Ch III 138.
\item \textsuperscript{342} Ibid.
\item \textsuperscript{343} Ibid., 139.
\item \textsuperscript{344} The enlarged 1853 edition, which I have used, consists of 115 pages.
\item \textsuperscript{345} Polson, \textit{Principles}, §V 11.
\item \textsuperscript{346} Ibid.
\item \textsuperscript{347} Ibid., Sect. II §I 14.
\item \textsuperscript{348} Ibid.
\item \textsuperscript{349} Ibid., §V 17.
\item \textsuperscript{350} Ibid., Sect. VI §VII 42.
\end{enumerate}
\end{footnotesize}
Polson’s law of nations, as that of Ward, Manning, and Reddie, remained Eurocentric. For all these authors the history of the science coincided with the history of Europe and the Christian religion. For Polson, for example, the high consideration of the law of nations during the Middle Ages was the result of the Christian evangelization of Europe.\textsuperscript{351} Moreover, like Manning, Polson argued that the authority of the law of nations stemmed from its recognition by both Europe and the newly independent states of South and North America.\textsuperscript{352} The Turkish Empire was the only exception to the Western pedigree of the law of nations.\textsuperscript{353}

Polson’s Eurocentrism, however, did not mean that he unremittingly endorsed imperialism. When assessing the phenomenon of European expansion overseas, he made a distinction between what the law stipulated and what morality dictated. Polson recognized that historically the law of nations had sanctioned the legality of dispossessing savage nations of their territories.\textsuperscript{354} At first, European nations used papal grants as sources of legitimation.\textsuperscript{355} Later on, they invoked other legal principles such as discovery and ‘priority of occupation’.\textsuperscript{356}

So, Polson recognized that, as a matter of fact, the rights of savages had been superseded by those of the Christian and civilized colonists.\textsuperscript{357} The law of nations recognized the power of states to acquire the territories of savage populations.\textsuperscript{358} The basis of that power rested on the superior civilization of states vis-à-vis savages.\textsuperscript{359}

But despite the legality of European acquisitions overseas, Polson challenged its morality. He cited Vattel’s opinion that North Americans could not appropriate for themselves all the territory of North America because they neither used nor improved most of it. He questioned this reasoning, wondering how anybody could be an arbiter of the needs of North American ‘tribes’.\textsuperscript{360} Only they could be judges of their own necessities. He added that the productive activities of hunting and fishing demanded large areas.\textsuperscript{361} Finally, he made the interesting point that using Vattel’s logic one could justify as well the seizing of the vast and sparsely populated territories of the Russian Federation, or British Australia for

\textsuperscript{351} Ibid., Sect. II §IV 16, 17.  
\textsuperscript{352} Ibid., Sect. IV §2 22. See also Manning, Commentaries, Book II Ch IV 76.  
\textsuperscript{353} Polson, Principles, Sect. IV §2 22-23.  
\textsuperscript{354} Ibid., §VI 24.  
\textsuperscript{355} Ibid.  
\textsuperscript{356} Ibid.  
\textsuperscript{357} Ibid., Sect. V §III 33.  
\textsuperscript{358} Ibid.  
\textsuperscript{359} Ibid.  
\textsuperscript{360} Ibid.  
\textsuperscript{361} Ibid.
that matter. Interestingly, his example of British Australia evidenced the paradoxical fact that Polson ignored that the territory he was referring to had actually been formed by the application of the very logic he was criticizing. In his example Australian peoples remained invisible, being superseded by the settler nation.

A similar distinction between the legality and morality of European occupation can be found in the work of Robert Phillimore (1810-1850). Some years after Polson’s *Principles*, Phillimore published a series of four volumes under the title *Commentaries upon International Law* (1854-1861). Phillimore rejected the positivist outlook of international law advocated by Polson and more clearly by Wildman. He defined international law as the laws that governed the rights and obligations of states in their mutual intercourse which emanated from the will of God. For Phillimore, states, like individuals, were moral agents that enjoyed rights and were liable to certain obligations. One of the main sources of international jurisprudence was Divine law, which obliged Christian and European nations as well as all civilized heathen ones.

Phillimore’s more pluralistic account of international law did not diminish the power of European nations over non-European territories. Phillimore defined *dominium* (the right of property) as the ‘fullest right’ that a person could have over a good. According to the *jus gentium*, occupation was one of the main forms of acquiring private property. Similarly to individuals, states could also acquire property through occupation. Original acquisition or acquisition by occupation gave states a title over unoccupied territory.

Occupation was a process, the completion of which entailed several steps. The first one was the act of discovery. Phillimore agreed with Wildman that discovery was the basis of the right to occupy and gave the discoverer an inchoate title to possession. Discovery produced this legal effect only under certain conditions. The discovery had to be made in the name of a state. The state could either give the explorer its authority before the discovery was made, or ratify it ex post facto. Discovery had to be followed by

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362 Ibid.
365 Ibid., Part I Ch I §VIII-§IX 48-49.
366 Ibid., §II 47.
367 Ibid., Part I Ch III §XXIII-§XXXI 56-60.
368 Ibid., Part III Ch XII §CCXXIII 196.
369 Ibid., 197.
370 Ibid., §CCXXIV 197.
371 Ibid., §CCXXVI 198.
372 Ibid.
an act of possession. But not all acts of possessions counted as occupation. Taking possession of a territory by merely erecting crosses or making external marks on the land to be acquired was not enough. Possession made the acquisition of unoccupied territory possible when discovery was followed by use of the land and settlement. In practical terms this meant that the territorial claims of European states in the New World were conditioned upon their founding colonies and using the ecosystems of the New World.

After having set the terms in which occupation created a title over territory, Phillimore discussed the extent of territory that could be acquired. He stated that there ought to be a middle course between the extremes of restricting the territory to the spot where a settlement was created and extending it to the whole continent. The American continent illustrated the point that no single European power could hold it all—in the course of history a sound set of principles had developed to rationalize colonization.

How did the pre-colonial population of America feature in this colonial scheme? Did they have any entitlement to their territory? At first glance it seemed that for Phillimore the inhabitants of America before European arrival were secondary actors on the European chessboard. He stated, for instance, that once a European state had occupied a given territory, any purchases obtained ‘by grants or conquest of the native’ had no legal effect. This was a restatement of the doctrine of the U.S. Supreme Court that Marshall had declared in *Johnson v. McIntosh*.

What was the legal justification of European pre-eminence in the Americas? To answer that question, Phillimore, like previous authors, mixed stadial theory with the agricultural argument. He maintained that in general settlements were justified in terms of the economic activities carried out by colonists, such as fishing, mining, and agriculture. The exploitation of nature gave rights to the land. Phillimore explained that, according to this logic, Vattel was right in holding that a pastoralist society had an exclusive title over the territories that they inhabited. Moreover, Phillimore continued, it had been argued that according to that rule even the ‘North American Indians’ could have excluded the ‘British fur-traders from their hunting grounds’.

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373 Ibid., §CCXXVIII 199.
374 Ibid., §CCXXX 201.
376 Ibid., §CCXXXVII 204-205.
377 Ibid., 205.
378 Ibid.
379 Ibid., §CCXL1 208.
380 Ibid., 209.
381 Ibid.
But that claim, that even savage populations had a right to exclude Europeans of their lands, did not square well with Phillimore’s doctrine of occupation by discovery. Phillimore resolved that apparent contradiction by stating that:

It may indeed be justly said, that the Earth was intended by God to supply the wants of the general family of mankind; and that the cultivation of the soil is an obligation imposed upon man: and it seems a fair conclusion from this premises, that when the population of a country exceeds the means of support which that country can afford, they have a right, not only to occupy uninhabited districts (which, indeed, they would be entitled to do irrespectively of this emergency), but also to make settlements in countries capable of supporting large numbers by cultivation, but at present wandered over by nomad or hunting tribes.382

As was common in legal discussions about the acquisition of non-European territory, Phillimore buttressed his argument by citing Vattel’s view that lazy savages, who had more territory than they needed, could not prevent the occupation of those lands by hard working nations with little space to expand at home.383 Vattel was also of the opinion that the colonization of the territories of North American savages was legal.384 Phillimore referred to those portions inhabited by backward non-Europeans as ‘uncivilized country’.385

As with many of his contemporaries, Phillimore coupled his blunt justification of European acquisition of vacant territory with an admonition about possible abuses. He routinely criticized the treatment of the pre-colonial population of Spanish colonies.386 He also remarked that the British had dispossessed and annihilated innocent non-European populations as well.387 Not all types of occupation were good, and some were inadmissible. In that sense, he favored the purchase of savages’ land and its acquisition by treaty, while criticizing European neglect of the rights of non-Europeans.388 In line with Vitoria, he believed that savages ought not to be despoiled of their belongings. Of course, according to the stadial logic of Phillimore, the fact was that they just possessed very little. Accordingly, the legal taking of vast non-European territories could be done in a humane fashion without needing to terrorize non-Europeans or take the little they had.

383 Ibid., §CCXLV 210. For Vattel’s views, see supra Chapter 4, pages 200-201.
384 Ibid.
385 Ibid., §CCXLIII 209.
386 Ibid., §CCXLIV 209.
387 Ibid., §CCXLV 210.
388 Ibid., and §CCXLVI 211.
Phillimore’s criticism of European colonialism was echoed in the Law of Nature and Nations by Leone Levi (1821-1888).\textsuperscript{389} Levi was a British jurist and political economist of Jewish origin and an adherent of progress and commerce.\textsuperscript{390} One of the main purposes of his treatise on the law of nature and nations was to criticize war and advocate for peaceful international relations. A believer in progress and Christianity, he thought that the spread of science and commerce, the consequent rise of wealth and comfort, and the increase of human knowledge were going to eliminate the need to resort to war.\textsuperscript{391} Religion was also a crucial instrument for bringing about human improvement and the cessation of warfare.\textsuperscript{392} In fact, his religiosity informed his naturalist understanding of the law of nations. He conflated the law of nations with the ‘natural laws of states’ and, following Phillimore, considered Divine law as one of the main sources of the discipline.\textsuperscript{393}

As part of the denunciation of warfare, Levi censured the innumerable colonial wars that Britain had fought against non-European populations.\textsuperscript{394} What is more, he lamented the near extermination of the pre-colonial populations of Australia and North America.\textsuperscript{395} Aborigines, he reminded the reader, had been unjustly dispossessed of their lands.\textsuperscript{396} But how could Levi’s colonial critique be reconciled with his firm belief in progress? After all, he was sure that at the time he wrote just a small part of humanity, comprising Europe and the U.S., was able to reap the benefits of civilization and commerce.\textsuperscript{397} Africa, for example, was still a ‘vast desert’ awaiting the influence of the Western civilizing hand.\textsuperscript{398} Contrastingly, he celebrated the formation of an empire of wealth and prosperity in colonial Australia in which the pre-colonial population did not feature at all.\textsuperscript{399}

Levi was convinced that ‘civilization, religion, commerce and science’ had contributed to make the world a better place.\textsuperscript{400} They had also transformed the worlds’ ecosystems. In the nineteenth century, Levi observed, the Earth was more ‘civilized and fruitful’ than ever before.\textsuperscript{401} Like other political

\textsuperscript{392} Ibid., Ch IV Sect. I 98-100.
\textsuperscript{393} Ibid., Ch III 59.
\textsuperscript{394} Ibid., Ch III Sect. XII 77.
\textsuperscript{395} Ibid.
\textsuperscript{396} Ibid.
\textsuperscript{397} Ibid., Ch IV Sect. II 101.
\textsuperscript{398} Ibid.
\textsuperscript{399} Ibid.
\textsuperscript{400} Ibid., preface vii.
\textsuperscript{401} Ibid.
economists of the first half of the nineteenth century, he assumed the existence of different states of society. In this sense, making the vacant lands of savage peoples productive through European colonization was part of the gentle civilizing influence that he advocated.

Levi positioned himself against war and violence but not necessarily colonialism. Following Phillimore and Vattel, he put forward a cosmopolitan argument that natural lawyers had often used in the seventeenth and eighteenth centuries to legitimize the colonial appropriation of unoccupied land. God, he asserted, had given the earth to mankind in general for their provision. The ever-growing increase of the human population had made the ‘discovery of new lands’ and the occupation of ‘uninhabited districts’ absolutely imperative. However, this necessity could not excuse the ‘expulsion of the original inhabitants’. Levi may have been thinking here about the U.S. policy of removing North American populations east of the Mississippi river from the territories they inhabited.

Levi was clearly against violent imperialism, but he also believed that everyone was going to benefit from European expansionism enacted in a gentle fashion. This was so because, whereas Europe and the U.S. were swiftly advancing in civilization, ‘Asia and Africa’ had stagnated. But this need to engender progress overseas was not carte blanche. His humanitarianism, like most of his contemporaries, sought to balance European rights to acquire the territories of savage populations with the need to safeguard the wellbeing of those populations. The territories where savages lived were so vast that Europeans could appropriate enough natural resources to satisfy the needs of settlers while still leaving some territory for the locals to live in peace. Levi wrote at a time in which the extinction of ‘Aborigines’ and ‘Indians’ seemed inevitable. He thus lamented the fact that colonialism had caused their likely vanquishing from the face of the Earth.

Benign imperialism was the agent of human progress. Levi believed that with gentleness Europeans could carry out their mission to improve the earth and make it more productive. Humans, at least some of them, were now in possession of the means to do so. Agriculture, for instance, could transform all the ecosystems that remained in a ‘wild condition’ into gardens, crop fields, and pasture. Science, chemistry, and mechanics allowed humans to control the planet and manipulate natural forces to a degree.

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402 See, for instance, ibid., vii; Ch II Sect. I 22-24; Ch IV Sect. II 101.
403 Ibid., Ch III Sect. XII 77.
404 Ibid.
405 Ibid.
406 Ibid., preface vii.
407 Ibid., Ch III Sect. XII 77.
408 Ibid., Ch IV Sect. II 101.
to which they had never before been capable.\textsuperscript{409} In the ‘early stages of civilization’, Levi affirmed, humans had only their own strength at their disposal.\textsuperscript{410} The power of steam had galvanized production and fostered industrialization. It had also made humans realize their power over matter.\textsuperscript{411} Transforming nature through human power was a cosmopolitan project that constantly pushed the horizon of human possibility. As he put it, new scientific and technological discoveries in the realm of the ‘physical world will contribute to render the whole world, the habitation of one universal family’\textsuperscript{412}.

The position adopted by Polson, Philimore, and Levi could also be found outside Great Britain. The Latin American Andres Bello (1781-1865) is a good example. Bello published the first book on international law of the Western Hemisphere. Written for a legal and diplomatic audience, \textit{Principios de Derecho de Gentes} saw the light in 1832.\textsuperscript{413} Born in Caracas, Bello was one of the most prominent Latin American politicians and intellectuals of the nineteenth century.\textsuperscript{414} An eclectic author, he made contributions in the fields of law, history, philosophy, grammar, and literature.\textsuperscript{415} Soon after its publication, \textit{Principios de Derecho de Gentes} became very influential in Latin America, especially in foreign Ministries and educational institutions.\textsuperscript{416}

Bello defined \textit{el derecho internacional} as the collection of rules that ought to be observed among nations.\textsuperscript{417} He distinguished between the natural law of nations, founded in human reason, and the voluntary or positive law of nations that was integrated by express or tacit agreement.\textsuperscript{418} He recognized that Europe constituted a family of nations that had been united by the advances of Christianity, culture, civilization, and commerce.\textsuperscript{419} But he wrote \textit{Principios} with the clear purpose of integrating Latin

\textsuperscript{409} Ibid.
\textsuperscript{410} Ibid.
\textsuperscript{411} Ibid., 102.
\textsuperscript{412} Ibid.
\textsuperscript{417} Andrés Bello, \textit{Principios de Derecho de Gentes} (Madrid, Librería de la Señora Viuda de Calleja e Hijos, 1844) Introduction §1 11.
\textsuperscript{418} Ibid., §5 18.
\textsuperscript{419} Ibid., §3 15.
America within the civilized family of nations. He did so by encouraging the cultivation of a science that was of utmost importance for the defense of the national rights of the newly independent nations.

As a political economist, Bello believed in the beneficial effects of free trade and agriculture for the economy. An admirer of the European Enlightenment, he wanted to apply the philosophical ideas of this intellectual movement to Venezuelan and Latin American governments and economies. Good government and modern agriculture, he believed, were vital for Venezuela's modernization and the progress of the whole of Latin America.

In Principios, Bello provided an exhaustive account of the acquisition of property. As with several natural lawyers of the previous centuries he affirmed that the world was first in a state of primitive community, meaning that everything belonged to humanity as a whole. God had created the world in common for the provisioning of humanity. Then, gradually, things were appropriated. Movable things were privatized first, followed by immovables such as land, rivers, and lakes.

Not everything was suitable for appropriation and privatization. By their very nature certain things did not become private property, as they could render a service to humanity without deteriorating by everyone’s use. Bello did not include land in the list of common things for the reason that its products were limited. He explained that in the primitive state of community a vast area could only provide a meager sustenance to a limited number of families. Only the incentive to possess it and enjoy it with exclusiveness could motivate humans to undertake the hard exertions required to make the land productive through cultivation. Once cultivated, the land could feed large numbers of people.

So for Bello, things were susceptible to privatization when they fulfilled three requirements. First, humans could appropriate what could not be used simultaneously by many people. Second, in order to be privatized things needed to exist in limited numbers or get deteriorated through use. Last but not

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421 Bello, Principios, Preface ix.
422 This is evident in his account of the history of Venezuela. See Andrés Bello, Resumen de la Historia de Venezuela (Barcelona, Red Ediciones, 2012) 40-45.
423 Jaksić, Andrés Bello, 84-85.
424 Bello, Principios, Part I Ch II §3 37-38.
425 Ibid., 37.
426 Ibid., 38.
427 Ibid.
428 Ibid., 38-39.
429 Ibid., 39
430 Ibid.
431 Ibid.
least, things could be privatized if human industry ‘improved them and adapted them to human use’.\textsuperscript{432} Land, of course, fulfilled all three conditions, and hence could be enclosed and protected against intruders.\textsuperscript{433} In Bello’s scheme, the logic of efficiency and privatization informed human progress. Those were the lenses through which he looked at the ‘newly discovered’ regions.\textsuperscript{434}

Bello maintained that the discovery of islands and uninhabited territories gave the discoverer nation a right to occupy them, which was valid against the claims of any other nation.\textsuperscript{435} Like subsequent British commentators he placed certain conditions on that right. In a Lockean fashion, he made a correlation between the amount of territory appropriated and the capacity of a nation to populate and cultivate it.\textsuperscript{436} Nations could not take more than they could use. Besides, the occupation of vacant lands ought to be followed by settlement and use.\textsuperscript{437} The erection of monuments in desert lands did not prevent the right of effective occupation of other nations.\textsuperscript{438}

Bello invoked both stadial theory and the agricultural argument to answer the question of whether savages could keep the territories that they inhabited. He was sure that reduced numbers of wandering tribes that made scant utilization of the land could not prevent discovering nations from appropriating their territories.\textsuperscript{439} Paraphrasing Vattel,\textsuperscript{440} he pointed out the legitimacy of European colonization. It was simply natural that Europe could ‘export’ its excessive population to the vast territories ‘discovered’, which the original inhabitants did not need and seldom used.\textsuperscript{441} Through an argument based on the efficient utilization of natural resources, he continued explaining why savages could be confined within narrower limits. He observed that ‘if, from the beginning of its existence, every nation would have wanted to claim an immense territory in order to live from hunting, fishing and wild fruits, the globe would have not been able of feeding a hundreds of the inhabitants that today inhabit it’.\textsuperscript{442}

For Bello, imperialism was not at odds with ethical behavior. Europeans could colonize the earth while leaving at the same time some territory for savage subsistence. Savages could be confined to certain areas

\textsuperscript{432} Ibid.
\textsuperscript{433} Ibid., 38.
\textsuperscript{434} Ibid., §5 44.
\textsuperscript{435} Ibid., 44-45.
\textsuperscript{436} Ibid., 45.
\textsuperscript{437} Ibid.
\textsuperscript{438} Ibid.
\textsuperscript{439} Ibid., 46-47.
\textsuperscript{440} Bello was an admirer of Vattel, and used his book on the law of nations as the main text to teach international law in the Colegio de Santiago in Chile. See Rogelio Perez-Pérdomo, \textit{Latin American Lawyers: A Historical Introduction} (Stanford, Standford University Press, 2006) 81.
\textsuperscript{441} Bello, \textit{Principios}, Part I Ch II §5 47.
\textsuperscript{442} Ibid.
in which they could continue their backward life unharmed. This was a win-win situation that many international lawyers of later periods also found palatable.

Bello established a further limit to European territorial acquisition. If the wondering tribes were pastoralists rather than hunters, barbarians rather than savages, they could not be deposed of their territories.\textsuperscript{443} Stadial theory was used in this case to limit colonialism. Still, Bello noticed that the case of barbarians had some parallels with that of savages and that it was difficult to fix the boundary that separated a ‘rational and just’ utilization of ecosystems from one that had a different character.\textsuperscript{444} But, at the end of the day, no matter where the boundary was fixed what was certain was that the capacity to exploit nature served as a standard to decide who the owners of the vacant areas of the earth ought to be—the civilized and advanced European and newly independent American nations.

Another representative of this line of thinking was the French jurist Eugène Ortolan (1824-1891). He published the only manuscript of the era that dealt exclusively with the question of occupation.\textsuperscript{445} For Ortolan the human need for private property was a natural instinct. By appropriating things, humans used God’s creation to satisfy their own needs.\textsuperscript{446} Like Locke, Ortolan linked private property and labor.\textsuperscript{447} He affirmed that the first way to acquire property was through work, or the use of humans’ physical and intellectual capacity to procure things of utility.\textsuperscript{448} That utility was not restricted to the satisfaction of life’s necessities; things could also be privatized for general human ‘convenience’.\textsuperscript{449}

The rationale behind individual appropriation could be applied to nations. The international acquisition of territory derived from a nations’ effort to tame and dominate nature. As Ortolan put it, the act whereby a nation acquired a territory was the act of using it and applying over it ‘the works of cultivation and the works of exploitation’.\textsuperscript{450} Through this standard of environmental exploitation, nations, by occupying certain portions of the Earth, actualized the goal—human ‘service and utility’—to which Providence had destined the world.\textsuperscript{451}

\textsuperscript{443} Ibid.
\textsuperscript{444} Ibid.
\textsuperscript{445} Eugène Ortolan, \textit{Des Moyens d’Acquérir le Domaine International ou Propriété d’État Entre les Nations, d’Après le Droit des Gens Public, Comparés aux Moyens d’Acquérir le Propriété entre Particuliers, d’Après le Droit Privé; el Saisir de l’Examen des Principes de l’Équilibre Politique} (Paris, Amyot, Rue de la Paix, 1851).
\textsuperscript{446} Ibid., Titre I Ch I §53 37.
\textsuperscript{447} Fitzmaurice, \textit{Sovereignty}, 225.
\textsuperscript{448} Ortolan, \textit{Des Moyens d’Acquérir le Domaine}, Titre I Ch I I §54 37.
\textsuperscript{449} Ibid., §56 39.
\textsuperscript{450} Ibid., III §65 45.
\textsuperscript{451} Ibid.
The only original way of acquiring property was what the jurists referred to as occupation. Ortolan made the—by then typical—point that, as the Roman law sanctioned, individuals could only occupy things that were *res nullius*. Similarly, nations could only acquire territory that was vacant. Ortolan acknowledged that the trips of discoveries by European nations had rendered in the past a great service to humanity. However, discovery *per se* was not enough to create occupation. The occupation of a country by a nation required the intention of occupying vacant land, the effective taking of possession of a territory, and works on the land that constituted settlement. Like Phillimore, Ortolan thought that the mere establishment of settlements into a part of an unoccupied territory did not give the settler nation a right over all of it. What a nation could not effectively occupy was open to acquisition. He illustrated this point by reference to the territorial dispute over Oregon.

Could European nations occupy the territory of savages? Ortolan answered affirmatively, resorting to a Vattelian reasoning. For Ortolan, traveling hordes and nomads did not thoroughly transform natural habitats through their work, and therefore were not really occupying all the vast extensions of territory that they misappropriated. The earth was appropriated through labor, and savages did not meet the standard of environmental exploitation. The extension of territory that a society occupied in the world amounted to the natural area that it could modify through the application of its productive forces. Sedentary non-Europeans practicing agriculture could have a legitimate claim over a large territory. But nomads could not prevent nations too tightly constrained in their continents from appropriating territories that their colonists were able to transform and make productive through agriculture.

Did this logic apply to the ‘Indians of America’? In practice, colonial history showed that in America the rights of the pre-colonial population had been largely ignored. But colonial practice was shifting. In North America, for example, English puritans had bought the land from the ‘Indians’. Similarly, at

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452 Ibid., §55 38.
453 Ibid., §56 39.
454 Ibid., III §68 46.
455 Ibid., 46.
456 Ibid.
457 Ibid.
458 Ibid., §76 50.
459 Ibid.
460 Ibid.
461 Ibid., §76 50.
462 Ibid., 50-51.
463 Ibid., §77 51.
464 Ibid.
the time of Ortolan, when the U.S. opened land by deforesting and pushed the ‘Indians back towards the forest’ they offered a price for the land.\textsuperscript{465}

Ortolan like most international legal commentators of the first half of the nineteenth century reconciled European colonialism with ethical considerations and the imposition of certain limitations to the occupation of territory overseas. It was clear that for Ortolan, as for Vattel, savages and nomads could not stop the wheels of progress, which, in practice, translated into a cosmopolitan program to civilize nature. But both authors agreed in favoring purchase of land rather than mere dispossession. But, for Ortolan, the savage receded into the forest—wilderness—as civilization advanced. And even if American Indians were not judged to be nomads, Ortolan nonetheless maintained that category was alive. This meant that when he wrote it was still possible to find other humans, like the peoples of Australia or perhaps communities in Africa, who could fall within that category.

Other authors did not show the moral scruples that Polson, Philimore, or Bello exhibited. They similarly justified colonial occupation, but remained silent about the entitlements and fair treatment of pre-colonial populations. This second position could be found in the writings of a few Anglo-Saxon international lawyers of Great Britain and the U.S.

In his \textit{Institutes of International Law}, published in 1849, the British lawyer Richard Wildman (1802-1881) explained that things that had not yet been appropriated by anyone could be acquired by occupation, as long as it was followed by continued possession.\textsuperscript{466} Likewise, when preceded by discovery, occupation legitimized European acquisitions of vacant territories overseas.

Wildman affirmed that the right of discovery gave the state in whose name the discovery had been made an inchoate title over the territory.\textsuperscript{467} The right of discovery could be exercised over islands, deserted lands, and territories sparsely populated ‘by savages’.\textsuperscript{468} To create an inchoate title, discovery had to fulfill two conditions. On the one hand, there ought to be an external mark such as a flag to be recognizable;\textsuperscript{469} on the other hand, discovery had to be followed by continuous possession.\textsuperscript{470} If possession was interrupted the territory reverted to its original condition of vacancy.\textsuperscript{471}

\textsuperscript{465} Ibid.
\textsuperscript{466} Richard Wildman, \textit{Institutes}, Vol I Ch II 69.
\textsuperscript{467} Ibid., 69-70.
\textsuperscript{468} Ibid.
\textsuperscript{469} Ibid., 70.
\textsuperscript{470} Ibid.
\textsuperscript{471} Ibid.
For Wildman, it was a self-evident truth that the occupation of vacant territory was legitimate, as it belonged to the historical practice of European nations. This belief was in line with his definition of international law as the custom of nations.\textsuperscript{472} He affirmed, following Polson, but in a more assertive way, that natural law was not part of international law.\textsuperscript{473} Nevertheless, reason played a role in the formation of custom. Wildman stated that ‘[h]e will not be wrong, who follows the old lawyers and holds’ the law of nations ‘to be, that which reason has induced, if not all nations, at least the most civilized, to observe in their intercourse with each other’.\textsuperscript{474} Savages and their practices were outside the scope of international law. Therefore, the way they used nature and the beliefs and practices that shaped that use were not recognized by international law. Those backward uses and conceptions could not thwart the projection, advance, and application of the European institution of private property over the underutilized territories of the Earth.

At the other side of the Atlantic, and some years before British scholars started writing manuscripts on international law, Henry Wheaton (1785-1848) wrote the first ever English-language general book on international law.\textsuperscript{475} By the mid-nineteenth century, his \textit{Elements of International Law} was one of the most read books on international law.\textsuperscript{476} It was soon translated to several languages, including Chinese, and became influential in Japan and Korea as well.\textsuperscript{477} In fact, Wheaton’s influence on the nineteenth century could be compared to that of Vattel and Grotius in previous centuries.\textsuperscript{478}

The impact of the book was felt immediately after its publication. In 1839, Oke Manning already praised Wheaton’s study as the best elementary inquiry into the discipline of international law.\textsuperscript{479} More importantly, for our analysis, is the fact that \textit{Elements} was soon adopted by the governments of the U.S., Britain, France, and other European countries as a book of reference.\textsuperscript{480} This is not surprising, considering that Wheaton had intended his book precisely to assist policy makers.\textsuperscript{481} So, his views on colonization

\begin{footnotesize}
\textsuperscript{472} Ibid., Ch I 14.
\textsuperscript{473} Ibid., 2.
\textsuperscript{474} Ibid., 16.
\textsuperscript{476} Koskenniemi, \textit{The Gentle Civilizer}, 114.
\textsuperscript{478} Liu, ‘Henry Wheaton’, 132.
\textsuperscript{479} Manning, \textit{Commentaries}, v.
\textsuperscript{480} Liu, ‘Henry Wheaton’, 132.
\end{footnotesize}
had a larger influence on the policies of European colonial powers than those of his contemporary international lawyers.

Wheaton divided international law into two branches: the natural law of nations, and the positive law of nations.482 Positive international law was, at the same time, subdivided into the voluntary, the conventional, and the customary law of nations.483 The law of nations was not a universal legal code but a set of international rules of conduct recognized by ‘civilized and Christian nations’.484

Wheaton examined the legality of seizing the lands of savages, a thorny question in the legal practice of the U.S., but a vital one for the future expansion of the new nation. He maintained that discovery and compact laid the foundation for Europe’s overseas possessions.485 These were not the only forms for obtaining legal title over colonies. Wheaton explained that the ‘uninterrupted possession’ of a particular region created an exclusive claim against which no other nation could counteract.486 The legitimacy of continued possession stemmed from the tacit or explicit general agreement of humanity.487 Mankind’s consent to this specific form of colonization had a cosmopolitan motivation, as it tended to foster humanity’s wellbeing. Wheaton’s argument that the whole of humanity had consented to colonization bizarrely implied that non-European polities (whose territories were appropriated by Europeans) had accepted the taking of the territories in which they lived.

After having established the legal doctrines that justified colonial acquisitions, Wheaton dealt with European colonial history, starting with ‘the splendid maritime discoveries’ of the fifteenth and sixteenth centuries.488 Independent of the legal practices of European colonial powers, he concluded, the one thing on which they all agreed was on ignoring almost completely the rights of the original inhabitants of the territories they visited and colonized.489 This statement was far from a critique; he was just describing a historical course of action with which he did not necessarily disagree.

Reproducing Marshall’s reasoning in Johnson v. McIntosh, Wheaton concluded that the rights of non-Europeans were subordinated to those of the discoverers.490 Upon discovery, the nation in whose name the discovery had been made acquired two kinds of legal entitlements. First, it acquired an exclusive right

482 Ibid., Vol I Part I Ch I §13 56.
483 Ibid.
484 Ibid., §11 54.
485 Ibid., Vol I Part II Ch IV §5 206-207.
486 Ibid., 207.
487 Ibid.
488 Ibid.
489 Ibid., 209.
490 See discussion in Chapter 7, pages 328-332.
to the territory, which could be exercised and made valid against rival claims of any other Christian nations. Second, it could extinguish the territorial rights of the ‘natives’. In America, the fate of ‘the natives’ was left to the decision of European powers and the nations that, like the U.S., had later encircled them. Wheaton explained that North American peoples had lost their lands largely through European conquest and ‘voluntary compact’. He justified this fate with an argument that mixed stadial theory and the agricultural argument, claiming that North American societies receded as ‘the progress of cultivation gradually compelled the savage tenant of the forest to yield to the superior power and skill of his civilized invader’.

German jurists were not as vocal as their American and British counterparts when elaborating the territorial rights of Europeans overseas. In fact, they were the only ones that provided a wider legal sphere of protection for pre-colonial populations. One of those jurists was Georg Friedrich von Martens (1756-1821), Professor of the Law of Nature and Nations at the University of Göttingen from 1783 to 1808, and also a diplomat who became famous for his compilations of international treaties. In 1789 he published a book on the law of nations, *Précis du droit des Gens Moderne de l’Europe*, that, like Bello’s and Wheaton’s treatises, was mainly oriented to a diplomatic audience.

Occupation was one of the multiple issues that Martens dealt with in his work. As with previous natural lawyers, Martens believed that in their primitive state humans related to their surroundings through a primitive community of goods. In other words, there was no private property, and things were ‘*res nullius*’—they did not belong to anybody and so everyone could use them according to their needs. But natural law allowed for the privatizing of things through occupation.

To what extent, Martens asked, could things be appropriated, and under what conditions did the right to occupy operate? He identified three requirements for privatization through occupation. In the first place, occupation applied only to those things that were, by their very nature, susceptible to possession

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492 Ibid.
493 Ibid.
494 Ibid.
495 Ibid.
497 I will use the 1821 version of the work: Georg Friedrich von Martes, *Précis du Droit des Gens Moderne de l’Europe* (Gottingue, Dans la librairie de Dieterich, 1821).
498 Ibid., Livre II Ch I § 35 77-78.
499 Ibid., 78.
500 Ibid.
501 Ibid.
by a nation or individual.\textsuperscript{502} In the second place, privatization needed to offer a real utility to the person appropriating a thing from the common.\textsuperscript{503} Finally, only things without owner—\textit{res nullius}—were open for occupation.\textsuperscript{504} After having established the conditions under which occupation operated, Martens remarked that the right to property belonged to every human being, independent of religion and mores.\textsuperscript{505} Therefore, the law of nations did not authorize Christians to take over ‘districts that were already effectively occupied by savages against the will of the latter’.\textsuperscript{506} Martens noted that, in practice, colonial history was full of episodes that went against this rule.

Occupation was effective when the intention to occupy was followed by the actual act of seizing what was vacant.\textsuperscript{507} Martens believed that acts such as declarations by nations, donations by the Pope, and even treaties were not enough to create a right to occupy.\textsuperscript{508} Discovery of territories later abandoned was also insufficient.\textsuperscript{509} The will to occupy had to be followed by concrete and permanent marks of occupation.\textsuperscript{510} Martens acknowledged the existence of a discussion between nations and intellectuals about what marks of occupation were valid.\textsuperscript{511} Were crosses, inscriptions, and other marks enough to assure the occupation of a country that was not cultivated? Martens did not answer this question. He simply noted that natural law established stricter requirements than the positive law of nations regarding the occupation of vacant territories.\textsuperscript{512}

Cultivation was not a definite standard of occupation in the case of the territory of nations. A nation owned all the territory in which it had established itself, even if parts of it were uncultivated.\textsuperscript{513} However, in the cases of uncertainty about territorial borders a nation could not exclude foreign nations from disputed territories that it did not cultivate or occupy.\textsuperscript{514} Here cultivation seemed the most definite standard, although not the only one, to prove occupation. Even though Martens did not continue this line of inquiry, based on his statement one could suppose that savages could also lose disputed territories over

\textsuperscript{502} Ibid., §36 78-79.
\textsuperscript{503} Ibid., 79.
\textsuperscript{504} Ibid.
\textsuperscript{505} Ibid.
\textsuperscript{506} Ibid.
\textsuperscript{507} Ibid., §37 79.
\textsuperscript{508} Ibid., 79-80.
\textsuperscript{509} Ibid., 80.
\textsuperscript{510} Ibid.
\textsuperscript{511} Ibid.
\textsuperscript{512} Ibid.
\textsuperscript{513} Ibid., §38 81.
\textsuperscript{514} Ibid., §38 82.
which they could not show effective occupation. After all, hunting did not leave a notorious mark over nature, and most commentators were convinced that ‘savages’ did not practice cultivation.

Martens, like Wolff, affirmed that savages had a right over the districts that they effectively occupied. Their defense of the territorial rights of savages was undisputable. However, the relevant question for assessing the degree of this legal protection was the extent of savage territorial occupation. Importantly, due to European stereotypes about savages, all natural lawyers believed that savages did not occupy much. They hunted and gathered fruits only in certain areas of North America. This logically meant that most of the continent remained an unpopulated wilderness that was open to occupation. Savage communities were mere human islands in a sea of wild nature.

Von Martens was ambiguous in his treatment of occupation. On the one hand, the fact that he discussed the legal requirements of the occupation of vacant lands in the context of European colonialism evidences that he was not totally against it. On the other hand, he clearly limited European occupation to the land that savages did not occupy. This ambivalence is evident in his discussion of European empire over non-occupied territories. He introduced the topic with the affirmation: ‘if it is imaginable that a nation exercises empire on non-occupied countries…’. The exercise of empire in these cases implied the consent of all those affected by the act of acquiring sovereignty.

Another German jurist, Johann Ludwig Klüber (1762-1837), shared Martens perspective on occupation. But instead of presenting the right to property as an individual right that also applied to nations, he simply looked at it from a state’s perspective. A state’s right to property consisted of the faculty to exclude all other states and private foreign individuals from the ‘use and appropriation of the territory’ of the state and all things contained within it.

Klüber observed that occupation only applied to things that were by their very nature susceptible to becoming private property and that were also ownerless. In addition, occupation demanded a state’s intention to acquire something, plus the actual act of placing it under its ‘physical power’. As with Martens, Klüber limited the occupation of vacant lands in the case of states. He affirmed that vacant lands

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515 Ibid., §44 91.
516 Ibid.
518 Ibid., Tome I Sect I Ch I §124 208.
519 Ibid., Tome I Sect I Ch I §125 209.
520 Ibid.
within a state’s territory belonged to that state, so foreigners could not occupy them.\footnote{Ibid., §124 208.} Those things were vacant only within the state, but not with regard to other nations or foreigners.\footnote{Ibid.}

For Klüber occupation was also extendable to vacant territories. In this regard, following Martens, he affirmed that the higher degree of culture that a nation had attained was not an excuse to steal the property of other nations, not even that of savages or nomads. This meant that, contrary to stadial accounts, the institution of ownership applied to savages and was used in this case to protect their territories and belongings.

The fact that savages had rights over territory was not in conflict with the fact that there were still vacant spaces in the world. Klüber affirmed that the occupation of parts of the globe that were uninhabited and had no master could not extend further beyond what was effectively possessed with the intention of taking it as property.\footnote{Ibid., §126 210-211.} Occupation was consummated by continued possession.\footnote{Ibid., §125 209.} Klüber, like Martens, discarded external marks of occupation that had been frequently used during European colonial history such as discovery alone, Papal authorization, or the Papal division of the world.\footnote{Ibid., §126 211.} A state’s appropriation of things was linked to something deeper, to the actual transformation of the physical world. Once a state had operated a change onto a thing through the application of its physical power that thing became its property.\footnote{Ibid.} That was so because separating the thing from the state impaired the fruits rendered by the state’s actions over it.\footnote{Ibid.}

So, Klüber’s claim that the property of savages ought to be respected did not amount to morally condemning European colonialism or considering it illegal. As Klüber observed, and Martens hinted, there were certainly vast unoccupied spaces on the Earth—which certainly savages could not claim to have effectively exploited—where Europeans could legally extend their reach. As savages died by the millions the legal position that they could retain some territory was perfectly compatible with the legal justification of the appropriation of almost whole continents.

\footnote{Ibid., §124 208.} \footnote{Ibid.} \footnote{Ibid., §126 210-211.} \footnote{Ibid., §125 209.} \footnote{Ibid., §126 211.} \footnote{Ibid.} \footnote{Ibid.}
Concluding remarks

James Mill and John Stuart Mill reformulated stadial theory in the nineteenth century. The intellectual lens of the kaleidoscope through which the Mills contemplated humanity revealed different civilizational categories as one turned its rotating conceptual tubes. Under the effect of these multifaceted prisms, the world was a canvas that could be divided into human compartments in various different ways. From a political economic perspective, for example, structuring societies into a four-layer developmental structure seemed appropriate. But four states of society could also be reduced to three: the uncivilized (savage hunting-gatherers and barbarian pastoral communities); the semi-civilized (countries with agriculture, some trade, and manufactures); and the civilized (manufacturing and trading European countries).

This division was important for the purpose of colonial administration. In the settler colonies of Australia and North America the British found savage societies. The level of social advancement of savages was very different from agricultural and commercial non-European nations. The European entitlement to their territories and the way to govern them were also rather different. Thus Mill’s societal distinctions provided a sound framework and a simpler roadmap for governing the world.

The ladder of progress could further shrink from a three-fold division into a rough opposition—civilized and uncivilized—which corresponded to the opposites of progressive/stagnant. As the uncivilized moved up the ladder they reached the threshold of material advancement that characterized advanced societies. This is the sense in which John Stuart Mill distinguished civilization to rudeness or barbarism in his essay Civilization. However, mere economic progress did not guarantee human happiness; it only prepared societies to transcend civilization in the ‘narrow sense’ of economic progress and cross the threshold from which a higher type of progress was attainable. Climbing the first part of the ladder was a condition sine qua non for entering the second. The uncivilized had to be first civilized as materially advanced Europeans had been, before they could both be completely civilized in the broader sense in which Mill understood this concept, in the production of a ‘happier, nobler and wiser’ type of human.

James and John Stuart’s conceptual kaleidoscope showed reality both through a static lens (reality as it was, or as they perceived it) and a dynamic or progressive lens (reality as it ought to be, or as the Mills

528 Mill, CW, Vol XVIII, 120.
529 Mill made explicit this correlation when he affirmed that ‘material civilization’ was ‘in the more backward regions of the Earth … the necessary condition and indispensable machinery of the moral’ (civilization). See Mill, CW, Vol XXI, 116.
530 See supra footnote 141.
thought it ought to be). Under the cosmopolitan ethos of human happiness and social progress, the latter had to be superimposed on the former, even if forcefully. And because, in theory, human happiness could be grasped in the abstract, the possibility that different communities could have conceived differently what constituted the good life for them was never an option. Interrogating backward individuals about what they thought made them happy seemed superfluous, even incongruent and absurd to the enlightened minds of James and John Stuart.

In his writings, Mill moved freely between different ways of categorizing humanity. The ladder of progress had four, three, or two steps, depending on the topic under discussion and the angle from which he looked at it. So, for example, the term savage or barbarian *stricto sensu* denoted one of the four stages of conjectural history. Understood in this sense, savages and barbarians had to be treated differently than other uncivilized groups living in a higher state of society. But sometimes Mill used the word savage, barbarian, or barbarism to include all the uncivilized communities as a way of contrasting them with the civilized.531 There were economic, social, and political implications for uncivilized societies that depended on their specific place in the scale of social progress, but some of those implications affected all of them. For example, in *Non-Intervention* Mill held that the international customs and morality that applied between civilized nations did not apply to barbarians, using that term as a synonym of ‘uncivilized’.532 Similarly, in *On Liberty* he recommended despotism as a way of dealing with barbarians. That was an exception to the rule of non-interference whereby the sphere of liberty for civilized individuals ought to be respected.533

The category of savage was well alive in the nineteenth century and carried important legal and practical consequences. The capacity to transform nature, the standard of environmental exploitation, was a key factor in the legal determination of the type of human community that had a better entitlement over certain portions of the Earth. For natural and international lawyers alike, occupation had a cosmopolitan ring. As populations grew and industrialization built momentum, imperialism created the possibility that hard-working and efficient European settlers substituted the inefficient use of the lands inhabited by savages. By the efficient exploitation of particular ecosystems those lands could render plentiful resources to satisfy the demands of the growing capitalist international economy for natural products.

531 For Mill’s different uses of the terms barbarian and savage see Levin, *J.S. Mill on Civilization*, 32.
532 Conversely, the ‘civilized peoples’ of ‘Christian Europe’ were governed by the law of nations. See Mill, *CW*, Vol XVIII, 120.
The belief in progress through environmental exploitation of vacant territories was widespread during the first half of the nineteenth century. But not every international legal commentator of the period justified the displacement of savages from their territories. Even if it is difficult to generalize from the varied array of attitudes of international lawyers regarding imperialism and the treatment of savages, it is safe to conclude that they were no uncompromising ideologues of Western imperialism. Most jurists, for instance, routinely underscored the immorality of Spanish conquest in America. Besides, some authors like Robert Phillimore and Eugène Ortolan advocated the purchase of land from savage peoples, and others like Leone Levi lamented their dispossession and annihilation. Of all nationalities, German jurists were the most ardent defenders of savages’ right to occupy (some) territory.

But despite benevolent attitudes toward savages all international lawyers and jurists of the period, with the exception of German authors, believed that hunting savages inhabited much more territory than they could effectively use. For this reason, European colonial powers could occupy those surplus territories and their natural resources. In most international legal treatises of the period, Vattel was widely cited in order to justify the legal displacement of retrograde productive activities (and those who carried them out) and their substitution with more efficient economic practices (and those who incarnated them). This may have sounded unethical at times, but most commentators agreed that it was certainly legal. It was also desirable, as a more intensive utilization of nature engendered human wealth and progress. This conviction sat comfortably with the ethical critic of the dispossession of savages. The vanishing savages could retain some hunting grounds and the little goods they possessed. An ethical standpoint was compatible with the colonial appropriation of the innumerable underutilized resources that savages did not use, the exploitation of which was the cornerstone of unending human progress.

The theoretical strong stand of stadial theory, occupation, the agricultural argument, and their reinforcing intertwinement travelled with the colonists to North America and Australia. The U.S. and the British used these legal and philosophical ideas differently in order to extend their empires over the peoples and ecosystems of those great land masses. The result was the Anglo-Saxon world, one of the most powerful political and economic conglomerates the world has ever seen. Its capacity to annihilate peoples and to exploit their natural habitats is a vivid proof of the darkest dimensions of its power.

534 Not everybody concurred with Vattel. Arthur Polson, for example, openly challenged the logic of appropriation defended by the Swiss author. See supra pages 300-301.
535 The compatibility of finding certain norms or legal doctrines of international law unethical but still legally valid is underlined by Koskenniemi. See Koskenniemi, ‘Into Positivism’, 202.
536 See supra Chapter 1, page 49-53.
The earth is a laboratory in which, as a chemist, man has hardly begun to operate. And Mechanics will enable us to bring into review and make the most of every force, latent and manifest.¹

During the seventeenth and early eighteenth century, several intellectuals such as Grotius, Locke, and Vattel had combined descriptions of the low state of advancement of non-European societies with doctrines that granted either individuals or colonial states access to the supposedly unproductive natural resources that those backward societies could not put into efficient use. One of the legal devices that they often invoked was the agricultural argument, which gave European nations a right to occupy uncultivated—or not properly cultivated—land in overseas territories.

By the end of the eighteenth century, dispersed but rather homogeneous descriptions of backward societies crystallized into a more elaborated theory of universal historical socio-economic development: conjectural history (also known as stadial theory). This theory provided further ideological validation to the legal doctrines that legitimized colonial acquisitions.

During the first half of the nineteenth century, in the context of European imperialism, this strand of thought was redeployed—albeit in a somewhat theoretically modified fashion—to prove that there were still underutilized regions in the world inhabited by savages and barbarians. Those backward human beings had more than they needed or could use, so they ought to make room for Europeans or nations and individuals of European-descent who could efficiently exploit natural habitats worldwide. James Mill and John Stuart Mill revised the ideological framework within which stadial theory worked, adapting them to

the social and economic requirements of the nineteenth century as well as to the growing imperial needs of making sense of, ruling, and transforming non-European peoples and ecosystems.

International lawyers of the first half of the nineteenth century also adopted this cluster of ideas based on the conviction that the Earth offered humans more than they were actually using. They translated those ideas into a legal vocabulary through the agricultural argument and the more general doctrine of occupation as enshrined in the law of nations. But the debates on the right to occupy during the nineteenth century were not constrained to the manuscripts of the law of nations and international law. In this chapter I will examine how stadial theory and occupation operated in concrete settings.

The British and U.S. governments, for example, developed the legal doctrine of occupation during their dispute over the Oregon territory. This controversy became famous and the legal developments that the Oregon Question brought about were routinely mentioned in the international legal texts of the time.

The debate about Oregon did not exhaust the practical context in which stadial theory and the doctrine of occupation was used. Under the auspices of the U.S.’ and New South Wales’ Supreme Courts, the theory and the doctrine were invoked—if differently—in settler societies in order to justify the expansion of the U.S. toward the Pacific Coast and its power over North American peoples and the British appropriation of Australia. Colonial nations and new nations, such as the U.S., arrogated a right to acquire territory and/or sovereignty in the territories supposedly inhabited by savages. The standard of environmental exploitation travelled from the chambers of jurists and intellectuals to colonial settings, justifying imperial rule and the appropriation of natural resources. North Americans and Australian tried to oppose the colonists, their alien legal tools, and exploitative worldviews regarding nature, and in so doing they fought a battle for their very survival.

U.S. expansion and North American peoples

The first instance in which the rights to sovereignty and private property over the land of ‘savage’ societies were tested in practice during the first half of the nineteenth century occurred in the context of the westward expansion of the newly born U.S. and the ensuing conflicts between North American peoples and settlers.

Since the early years of the new Republic the peoples of North America had been characterized as savages living in the hunter stage. Stadial theory provided a key intellectual prism to conceptualize North
American peoples’ relationship to land and natural resources, one that was already used by the Founding Fathers of the U.S. Benjamin Franklin, for instance, wondered whether it was ‘the design of Providence to extirpate this savages in order to make room for cultivators of the earth’. Similarly, when Thomas Jefferson discussed the factors that were contributing to the decimation of North American societies in the State of Virginia, he mentioned the loss of territory. Losing their natural habitats was extremely costly for the savages, as Jefferson called the peoples of North America, as they subsisted ‘on the spontaneous productions of nature’. Their backwardness and closeness to nature was the reason why their societies lacked some of the main traits of civilization—namely, laws and government.

George Washington compared the expulsion of North American peoples from their lands by force with forcing wild beasts out of the forest. Furthermore, he maintained that the extension of white settlements will ‘cause the savage as the Wolf to retire’. And he went on, characterizing both as beasts of prey. The fusion between North American peoples and animals conveyed the idea of their lack of material culture. Savagery receded as settler agriculturalists occupied land and planted the seeds of civilization by improving North American wilderness through their labor.

Neither Franklin nor Jefferson nor Washington for that matter had an especially negative view of North American peoples when compared to that of the majority of their contemporaries. Nonetheless, it was clear to all of them that North Americans constituted a stumbling block in the way of the progressive new nation. In the legal terrain, many questions related to the position of North American peoples vis-à-vis the U.S. had yet to be answered. What was their legal status? Could settlers purchase land directly from North Americans? Could States exercise legislative power and jurisdiction over them, or did these competences belong exclusively to the Federal government?

These questions received different answers at different periods of U.S. history. In the early years of the Republic, the Federal policy crafted by President Washington and Secretary of War Henry Knox in regards North American peoples recognized them as sovereign nations. This treatment was not the result of ethical considerations, but practical ones. Washington and Knox where conscious that if the legal status

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4 Ibid.
5 Ibid., 150.
6 Francis Paul Purcha, Documents of United States Indian Policy (Nebraska, University of Nebraska Press, 2000) 2.
7 Ibid.
8 Ibid.
of North American peoples was downgraded so as to lose sovereignty and property over their lands, hungry states, settlers, and speculators would seize the opportunity to try to apprehend their territories by all means. This possibility was surely going to ignite conflict between the new nation and the North American peoples, a prospect that Washington and Knox wanted to avoid at all costs.10

The Washington administration related to North Americans politics on an equal footing, treating them as independent nations and regulating their intercourse through treaties.11 Besides, Henry Knox and other members of the administration believed that North American peoples could be Christianized and that they would eventually adopt the sedentary ways of their white agriculturalist neighbors.12 Through a civilizing program based on agriculture and private property they could be assimilated, and eventually melt into the body of the new nation without recourse to the use of force.13 Moreover, settled farmers required much less land than wandering hunters. Washington policy-makers believed that a shift from hunting to cultivation was going to create surplus land that North Americans’ would be more inclined to cede or sell.14

This line of thinking is evident in a report on Indian affairs written by the geographer Jedidiah Morse for the U.S. Secretary of Defense in 1820.15 Jedidiah claimed that North Americans had their own government and laws.16 Despite their capacity to manage their own affairs, they were legally within the jurisdiction of the U.S., and that jurisdictional power entailed the prerogative of disposing of their land.17 North Americans had a right of occupancy over their territories, but the complete title was in the hands of the U.S. government.18

11 Andrew Denson, Demanding the Cherokee Nation: Indian Autonomy and American Culture (Lincoln, University of Nebraska Press, 2004) 16.
12 Ibid., 17.
13 Ibid. The imposition of the notion of private property among the Cherokee is mentioned in Wendell H. Oswalt, This Land Was Theirs: A Study of Native Americas (Boston, Mc Graw-Hill/ Mayfield Publishing, 2002) 409.
14 Izumi Ishii, Bad Fruits of the Civilized Tree: Alcohol and the Sovereignty of the Cherokee Nation (Lincoln, University of Nebraska Press, 2008) 40.
15 Jedidiah Morse, A Report to the Secretary of War of the United States on Indian Affairs, Comprising a Narrative of a Tour Performed in the Summer of 1820, under a Commission from the President of the Unites States, for the Purpose of Ascertaining, for the use of the Government, the Actual State of the Indian Tribes in our Country (New Haven, Printed by S. Converse, 1822).
16 Ibid., 67.
17 Ibid.
18 Ibid. Morse was convinced that North Americans could not own their territories because they had no notion of private property. They roamed over their lands rather than inhabited it. He buttressed these arguments by reference to several intellectual authorities. First, he cited Vattel’s famous passage on the legitimacy of constraining the hunting societies of North America within narrower limits and the legality of planting colonies in a vast territory inhabited by wandering tribes. He also
Jedidiah explained that the amount of land required in the hunter stage was far larger than what people living in the agricultural stage needed.\footnote{Ibid., 68. This view was radically contrary to the Vattelian argument that savages did not need much land and hence ought to give away part of their territories to European nations. It is a paradox that opposing lines of reasoning were used for the same end: dispossessing those considered ‘savages’.
} The program of civilizing North Americans, to which Jedidiah’s report contributed, was going to help them making the leap from the lower to the higher state. Once that shift was accomplished, Jedidiah thought that ‘the advantages of the agricultural, over the hunter state’ were ‘presumed to be a just equivalent to the Indians for the lands they are constrained to resign to the civilized state’.\footnote{Ibid.} Civilizing North Americans would create a win-win situation. While North Americans received the gift of civilization from the U.S., the latter would acquire the surplus land that hunters-turned-peasants would no longer need.

The policy considerations of the Washington administration with regard to the peoples of North America were translated into legal form through the Trade and Intercourse Acts of the 1790s. The Acts prohibited U.S. citizens to deal directly with the peoples of North America, reserving that competence to the Federal Government.\footnote{Matthew L. M. Fletcher, ‘The Original Understanding of the Political Status of Indian Tribes’ 82 St John’s Law Review (2008) 153-181, 170-171} In the eyes of Washington policy makers, trade was the best way to engage with North Americans as it was supposed to create a mutual interest in maintaining peaceful relations.\footnote{Ibid.} In addition, the new laws gave the President the power to promote the civilization of North American peoples.\footnote{Ibid.}

This scenario radically changed in the following thirty years. By the second decade of the nineteenth century, the peoples of North America did not represent a military threat within the territory of the Union. Andrew Jackson’s militia had caused havoc among the North American communities of the South East and William Henry Harrison had defeated several other polities in the Northwest.\footnote{John Fabian Witt, Lincoln’s Code: The Laws of War in American History (New York, Free Press, 2012) 94-104.} In addition, the high mortality among North Americans peoples caused by smallpox, the social disruption provoked by alcohol, and the depletion of the natural habitats from which they obtained their food represented a great challenge for the survival of North Americans and their way of living.\footnote{John P. Bowes, The Trail of Tears: Removal in the South (New York, Chelsea House, 2007) 8.} The belief that North American peoples east of the Mississippi were at the brink of extinction was widespread among U.S. citizens Montesquieu and Adam Smith. Finally, he referred to the decision of the US Supreme Court \textit{Fletcher v. Peck}. Ibid., Appendix, 281-284.
commentators. Nonetheless, those who survived the impact of their white neighbors still retained a good deal of territory.

The presence of backward North American peoples was increasingly regarded as a hindrance for the new effervescent nation embarking on a project of growth and, hence, avid for natural resources that could keep its incipient economy booming. Economic expansion and population growth were particularly noticeable in the South, where the demands of the textile industry created an increasing need for new lands and hands (most of them slaves) for cotton plantations. At the same time that Americans felt that their destiny was to improve the territories in which they lived, many believed that the policies to civilize North Americans were not working. Therefore, the question of whether the territory of North American peoples should be put into the hands of those who could better exploit them—white Americans—or whether hunting-nomads North Americans could retain them as rightful owners became more pressing than ever before.

In no other place was this issue more contentious that in the state of Georgia. Since the beginning of the nineteenth century, the state of Georgia had tried to extend its sovereignty and jurisdiction over the Creek and Cherokee nations. The attempt to exercise power over different North American peoples also posed a challenge to the exclusive sovereignty of the Federal government over the territory of the U.S. It was in the midst of this intricate political situation that the Supreme Court intervened in order to resolve the thorny legal questions surrounding the relation between the new nation and the North American peoples.

The Marshall Trilogy and North American vacant nature

The Supreme Court had the first chance to have a say on this matter in 1810 in the case of *Fletcher v. Peck*. The conflict, which did not involve North Americans directly, originated as the legislature of the State of Georgia gave fee simple title to four development companies—the Georgian Company and the

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26 Ibid., 9. See also Brantlinger, *Darks Vanishing*, 45-67. Marshall was one of those who thought that North Americans were doom to be extinguished. See R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, Louisiana State University, 2001) 441.
27 The population of Alabama alone increased from 9,046 inhabitants in 1810 to 127,901 ten years later. See Bowes, *The Trail of Tears*, 17.
28 Denson, *Demanding the Cherokee Nation*, 20.
29 Ibid.
New England Mississippi Land Company among others—over the Yazoo lands located in the western part of the territory claimed by Georgia (present day Alabama and Mississippi). A subsequent legislature declared the grants void and, in consequence, the grantees sued.

The Supreme Court unanimously decided that the legislative act that repelled the Yazoo grants was unconstitutional as it violated Article I, section 10 of the Constitution, which forbade states to pass legislation impairing contractual obligations. It also recognized that Georgia had the power to grant the lands, as they were within its territory. However, this affirmation created a conflict with the supposed rights that North Americans had over the same lands. The Court overcame that difficulty by affirming that ‘the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state’. The Court reached a Solomonic decision trying to reconcile the interests of Native Americans, States, and central government. It recognized the existence of North Americans’ title to the land at the same time that it preserved the power of the federal government to extinguish that title, while still acknowledging Georgia’s preeminent right to the lands.

Interestingly, one of the arguments presented for Peck, the defendant, directly addressed the question of the nature of North Americans’ title. Robert Goodloe Harper and Joseph Story, Peck’s representatives in front of the Court, invoked classical tenets of stadal theory in conjunction with the law of nations in order to prove that North Americans were not owners of their lands. They described North Americans according to their main productive activity: hunting. Harper and Story made the classical connection between the hunting stage (the one in which North American societies lived) and the lack of property rights. North Americans ‘overrun’ their territories rather than inhabit them. Harper and Story cited

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35 *Fletcher v. Peck*, 142.
37 *Fletcher v. Peck*, 121.
38 Ibid.
39 Ibid.
Montesquieu, Adam Smith, and Vattel to back up their argument that societies which could not master their environment and make it productive had no property rights and, hence, according to the law of nations had no legal title over their territories. This conclusion was important as, according to Harper and Story, the status of North American peoples in the new republic had to be determined by reference to the law of nations.40

In his judgment, Marshall tiptoed over the question of Indian title. Although he acknowledged that Indian title had to be respected by courts, he also affirmed that the title could be extinguished. Moreover, even though Marshall did not directly address the point raised by Peck’s defense, he still maintained that in the U.S. there were ‘vacant lands’, that is, territories whose natural resources were not productive and were thus open to occupation.41

The question of Indian title came squarely to the fore of the Court’s legal analysis thirteen years later in Johnson v. McIntosh in 1823. The case involved competing claims to the property of the same land made by two individuals of Euro-American descent: Mr. Johnson and Mr. McIntosh. So, again, North American peoples were not directly part of the case. Mr. Johnson had obtained two land grants from North American peoples without the consent of the federal government in 1773 and 1775, before the first Trade and Intercourse Act (1790) gave the Union the monopoly to deal with the peoples of North America.42 Mr. McIntosh had got his title from the federal government, which had got the lands from North American peoples by cession.43

Mr. Winder and Mr. Murray, McIntosh representatives, argued in front of the Court against the plaintiffs’ contention that the ‘Indians’ were the owners of the disputed land. According to them, North American peoples still lived in the state of nature and could not join the community of nations.44 According to natural law, they claimed, the right of private property over a territory of a particular people was linked to that people’s capacity to utilize their territory to provide for their needs.45 Having described North Americas in such a derogative fashion, the logic of stadial theory combined with the agricultural argument played straight into their hands. They contended that wandering and hunting tribes who did not
form civil societies could not prevent agricultural people from seizing their lands. In order to add legal weight to their claims they cited passages from various renowned thinkers who had previously endorsed those ideas—namely Grotius, Montesquieu, and Locke.

In his judgment, Marshall identified two legal sources applicable to the case. On the one hand, he found it pertinent to study the principles adopted by the U.S. On the other, he affirmed that the law of nations, or what he called the ‘principles of abstract justice … admitted to regulate … the rights of civilized nations’, was also relevant to the case.

Based on those laws, Marshall was to determine whether North American people had legal title over their lands and could, therefore, cede them. In order to elucidate this question, he looked back at North American colonial history. During conquest colonial powers had sought to avoid inter-European confrontation. In order to do so, they found a legal principle according to which they could regulate their respective claims to North American territory. That principle was based on the doctrine of discovery.

For Marshall, discovery produced two different legal effects depending against whom it was exercised. Invoked against European powers, discovery secured the claims to legal title made by the European state in which name the discovery was made, provided that discovery was followed by actual possession. In other words, once a particular European country invoked it, all other European powers were prevented from arrogating a right over the land of North American peoples and from founding colonies in the territory so claimed to have been discovered and possessed. But discovery also had significant legal consequences concerning relations between European powers and North American peoples. In this case, it gave European nations a right to extinguish the title of occupancy of North Americans, either by purchase or conquest. In other words, North Americans were mere possessors of the soil and not its real owners. They still retained a right to dispose of the land and use it at their convenience, but they could not alienate it.

After having established the doctrine of discovery as the legal ground to resolve the question of North Americans’ status within the territory of the U.S., Marshall buttressed his findings by reference to

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46 Ibid., 570.
47 Ibid.
48 Ibid., 572.
49 Ibid.
50 Ibid., 573.
51 Ibid.
52 Ibid., 587.
53 Ibid., 574.
54 Ibid.
colonial history. The U.S. as the heir of the European colonial powers had inherited a right to extinguish North Americans’ ‘title of occupancy’. Thus, Marshall granted the U.S. ‘title of all the lands occupied by Indians’. This power to extinguish their right to occupancy also stemmed from the U.S.’ sovereignty—if limited—over them.

At this point in his reasoning, Marshall considered whether the agricultural argument was applicable to the case, or as he put it: ‘whether agriculturalists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits’. He refrained from shedding light on this question. He just concluded that conquest was validated by practice because the courts of the conquering power so agreed, irrespective of the justice of the claim (that agricultural people had a legal right to the lands of hunters) in whose name they were made.

It is interesting that, referring to the agricultural argument, Marshall stated that he did not want ‘to engage in the defense of those principles’ but, after this affirmation, he did exactly that. According to him, European conquest found ‘some excuse, if not justification’ in the ‘character and habits’ of the peoples of North America. The English had found savage societies that merely subsisted from the products of the forest. To have left North America in the hands of those societies was tantamount to have left it as ‘a wilderness’. His words could not be more illustrative. Once North America was settled by agriculturalists, Marshall continued, game fled into thicker and pristine forest, and so did the Indian. Game and North Americans were assimilated because they behaved alike when it came to the use of nature. Wilderness was not only North Americans’ natural habitat but also their internal condition. Both had to be reformed, by the hand of European colonists first, and U.S. settlers afterwards.

By refraining to endorse the applicability of the agricultural argument to the territories of North American peoples, Marshall seemingly invested their possession with a certain degree of legal security. They could not be deposed of the natural resources from which they subsisted on grounds of their social

55 Ibid., 574-580.
56 Ibid., 587.
57 Ibid., 588.
58 Ibid.
59 Ibid., 588.
60 Ibid.
61 Ibid.
62 Ibid., 589.
63 Ibid.
64 Ibid., 590.
65 Ibid.
66 Ibid., 590-591.
backwardness. However, his defense of conquest based on a rationale derived from stadial theory ended up producing the very same effect as a straight application of the agricultural argument.67

Marshall also believed that British colonists had found vacant land in North America, that is, land that was unoccupied and unused. So, even if the peoples of North America were recognized as owners of certain territories, there were vast tracts of land, which according to European colonists’ perception of the environment were not utilized. By appropriating and exploiting supposedly pristine natural habitats, worldwide European colonialism in North America and the U.S. government afterward contributed to the wider cosmopolitan goal of making the world productive. But at the end of the day, any difference between vacant territory and North Americans’ territory was eroded. As Marshall recognized: ‘So far as respected the authority of the Crown, no distinction was taken between vacant land and lands occupied by the Indians.’68 The Crown had the same power to dispose of all of them.

Marshall recognized that according to the usages of civilized nations, as Vitoria and other authors had defended, North American peoples may have had a natural right to own their territories.69 But the conquerors could not respect those natural rights due to the aggressiveness and backwardness of North Americans.70 North American savages were fierce. Their main occupation was war. Therefore, conquest was necessary to secure the life and property of the settlers as well as their economic activities. Frontier violence against North American violence was a facilitator of economic progress. In fact, the task of ameliorating their surroundings and making the land productive was the new nation’s manifest destiny; a destiny that required pushing wilderness and one of its constitutive parts, North Americans, further away.

Even though theoretically the law of nations would have protected the property rights of North American peoples, in practice conquest was indispensable to the way in which North America had to be colonized.71 Moreover, applying the logic of stadial theory, Marshall explained that conquest was adapted to the different state of society of the colonizer and the colonized, and hence was defensible in front of the former’s courts of Justice.72

67 For Robert Williams Jr., Marshall, reproduced in Johnson v. McIntosh, the same derogatory characterization of North Americans as the Fathers of the Revolution informed their policies with regard to the peoples of North America. See Robert Williams Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights and the Legal History of Racism in America (Minneapolis, University of Minnesota Press, 2005) 53-54.
68 Johnson v. McIntosh, 595.
69 Ibid., 591.
70 Ibid., 590-591. See also McHugh, Aboriginal Societies, 39.
71 Johnson v. McIntosh, 590.
72 Ibid., 591-592.
Johnson v. McIntosh shattered the aspiration of the peoples of North America to relate to the U.S. government in terms of equality. Soon after the case was decided, the judgment of the Supreme Court and the stadial logic contained in it were used by Campbell and Meriwether, U.S. treaty commissioners, to pressure the Cherokee to cede their territory.\textsuperscript{73} At the same time, the controversy surrounding the Creek and Cherokee’s territory in the state of Georgia escalated. Georgia’s Governor George Troup argued, following the logic used by Marshall in Johnson v. McIntosh, that the Creeks only had a right of temporary occupation for hunting in the territory of Georgia.\textsuperscript{74} In addition, he bitterly complained about U.S. attempts to civilize the Creeks and turn them into agriculturalists. This policy had enhanced their legal status, strengthening their legal claim to the property of their nations’ territory in Georgia.\textsuperscript{75}

Tension between the Union and the state of Georgia over the question of jurisdiction over Cherokee and Creek territory intensified during the 1830s. Emboldened by the election of Andrew Jackson as President of the U.S. and Congress’ adoption of the Indian Removal Act of 1830 (which allowed the President to negotiate for North American lands and to remove all North Americans east of the Mississippi river), the Georgian legislature took a series of assertive steps that enhanced Georgian power over the Cherokee.\textsuperscript{76} In June 1830 an Act of December 1827 came into force, enabling Georgia to unilaterally extend its jurisdiction over the Cherokee Nation and legalizing white settlers’ incursions in their lands in contravention of existing federal treaties.\textsuperscript{77} Soon after the application of this law a Cherokee individual, George Tassel, was captured and judged for a crime he had committed within Cherokee territory.\textsuperscript{78} Tassel was judged by a convention of judges from the county of Hall, which, according to Georgian legislation, exercised jurisdiction over the area of Cherokee territory where Tassel allegedly committed his crime.

William Underwood, Tassel’s attorney, challenged the legitimacy of Georgia’s 1827 law, arguing that the U.S. government had treated the Cherokee Nation as a sovereign independent state on several

\textsuperscript{73} Lisa Ford, Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836 (Cambridge/Massachusetts, Harvard University Press, 2010) 137.
\textsuperscript{74} Governor’s Message to the General Assembly of the State of Georgia, at the Opening of the Annual Session, November 7, 1825, with the Documents Accompanying the Same, American State Papers, House of Representatives, 19\textsuperscript{th} Congress, 2nd Session, Indian Affairs, Vol 2, No 249, 777-784, 780. The link between Troup’s speech and the Supreme Court decision is made in Ford, Settler Sovereignty, 141.
\textsuperscript{75} Governor’s Message, American State Papers, Vol 2, No 249, 779. These were not the only references to Johnson v. McIntosh, a case that was known and used in the British colonies mainly because it recognized that settlers could only acquire legal title from the Crown. See McHugh, Aboriginal Societies, 40.
\textsuperscript{76} Ami H. Sturgis, The Trail of Tears and Indian Removal (Westport, Greenwood Press, 2007) 36-37.
\textsuperscript{78} Ford, Settler Sovereignty, 189.
occasions. Therefore, a state of the federation could not exercise jurisdiction over members of the Cherokee Nation. By exercising jurisdiction over the Cherokee Nation, Georgia had contravened treaties between the U.S. and the Cherokee, which were according to the federal Constitution ‘supreme law of the land’. 79

The commission of judges responded to Underwood by restating what the Supreme Court had maintained in Johnson v. McIntosh, namely that the peoples of North America were mere possessors of the soil. Moreover, their power to dispose of their land was curtailed in favor of European colonial powers first and later to the U.S., which could unilaterally ‘extinguish Indian title to occupancy, either by purchase or by conquest’. 80 The commission further referred to the Supreme Court to note that by virtue of its decision all the land of the Cherokee Nation had been ‘vested in fee in the State of Georgia’. 81

Tassel appealed the verdict of the commission to the Supreme Court. Marshall looked at the question in Cherokee Nation v. Georgia; or, rather, he refrained from looking at it. In fact, Marshall did not go into the merits as he found that the Court had no jurisdiction to adjudicate the case. In order to reach that conclusion Marshall explained that, according to the Constitution, cases between a state of the Union and foreign states fell within the jurisdiction of the Supreme Court. Therefore, the decision on admissibility boiled down to the question of whether the Cherokee Nation, who had presented the motion before the Court, could be regarded as a foreign state according to the Constitution. 82 In his response Marshall denied that the Cherokee Nation could be regarded as a foreign nation by famously characterizing the peoples of North America as domestic dependent nations. 83 In consequence, the Cherokees could not file a case before the Supreme Court.

In his separate opinion Justice Johnson concurred with Marshall’s conclusions, but for different motives. He claimed that the denomination of ‘State’ was not applicable to peoples who were as low in the state of society as ‘our Indian tribes’. 84 They definitely had no part in the society of nations. 85 When North America was discovered by European nations, they had found ‘a race of hunters’ living in a

80 Ibid., 158.
81 Ibid., 160
83 Ibid., 17.
84 Ibid., 21.
85 Ibid., 26, 27.
backward social stage. Having found populations that did not have private property, the colonists acquired both private property rights and sovereignty over their territories. Johnson referred to the civilizing policies of the U.S. with regard to the Cherokees which aimed at elevating the Cherokee Nation from the hunter state of society to the agricultural stage. According to him, that policy had been a failure. So he concluded that North Americans were ‘an anomaly … which the law of nations would regard as nothing more than wandering hordes … and having neither laws nor government beyond what is required in a savage state’.

The Supreme Court had a new opportunity to resolve the controversial issue of Georgia’s power over North American peoples soon after the Court’s lack of jurisdiction had prevented it from doing so in Cherokee Nation v. Georgia. In 1832 a new case, Worcester v. Georgia, came before the Supreme Court, offering the possibility of settling once and for all the thorny question of the extent of federal and state power over the peoples of North America. Could Georgia dispose of Cherokee land or was that competence exclusively in the hands of the federal government? Did Georgia have jurisdiction over the Cherokee Nation? The Court had already shed some light on these questions, but for political reasons it had to refrain from giving a definite answer. The Court was well aware, as it noted in Fletcher v. Peck, that especially the land question ‘threatened to shake the American confederacy to its foundations’. Moreover, to reach a definite conclusion on the matter, the Court had to evaluate North Americans’ rights to sovereignty and property over their lands, an assessment that required navigating the complex political waters of U.S.-North American relations.

The new case in front of the Supreme Court involved a U.S. citizen, Samuel Worcester, who in defiance of Georgia’s laws (which offered white people the choice of departing from Cherokee lands or making a vow of allegiance to the State of Georgia) had refused to leave the Cherokee Nation. After having been convicted under Georgia’s laws Worcester appealed to the Supreme Court, arguing that the laws under which he was found guilty were unconstitutional. This time, the Supreme Court could not dismiss the appeal on jurisdictional grounds, and hence it was compelled to look into its merits of the case.

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86 Ibid., 22.
87 Ibid.
88 Ibid., 23.
89 Ibid., 24.
90 Ibid., 27-28.
In order to ascertain the degree of ascendancy that the state and the federal government exercised over North American peoples, Marshall first evaluated the character of the polities in which the population of North America lived before conquest. From the outset, Marshall described North American polities by inserting them into a ‘stadial mold’. Referring to the colonial encounter he explained that Europeans found territories in North America in the hands of peoples who ‘had made small progress in agriculture or manufactures’. The peoples of North America, he continued, were warlike and lived from hunting and fishing.

Marshall was conscious of how his previous judgment had been used by Georgia to back up exorbitant claims of power over North American peoples that not only challenged their survival but also threatened federal competencies. He was also aware that the low stage of social advancement of North American peoples had been used in the past by the Georgian government to substantiate rights of private property and sovereignty over all lands in possession of North American peoples within the limits of the state. So, Marshall went straight to the question of whether by nature agriculturalists and manufacturers had rights over societies of hunter-gatherers and fishermen. Could European colonial powers claim ownership of American territory from the Atlantic to the Pacific? This time his answer was unequivocally negative.

Marshall explained that, prima facie, claims of European dominion over North America—and vice versa—were bizarre and utterly unfounded. In his opinion there were independent nations in both continents. Those nations had their own government, laws, and institutions. After having set the stage for his later inquiry, Marshall proceeded to rework stadial theory so as to raise the threshold of protection granted to North American people. Even though he characterized North Americans as societies in the hunting stage (and hence as backward peoples), Marshall refrained from drawing the conclusion that they had no laws, government, or notion of property over land, assumptions that were typical among authors who wrote in the tradition of conjectural history. North Americans had all the traits usually associated with civilized societies.

Although Marshall’s legal reasoning helped to somewhat secure North American peoples’ standing before the law, he still had to reconcile their social status with the colonial fact. In order to do so, he acknowledged that European prowess, war, and conquest had tipped the balance of power in favor of the

93 Ibid.
94 Ibid.
95 Ibid.
96 Ibid.
Europeans who ended up settling the continent. Colonialism was a fait accompli and had to be recognized as such. But that did not mean that North American peoples could be dispossessed of their territories or ruled at will.

One of the legal doctrines that Marshall redefined in order to distance himself from his earlier conclusions was the right of discovery. In Johnson v. McIntosh that right was the cornerstone of all his legal reasoning about North Americans’ status. Discovery was the basis of European and later U.S. ascendancy over them. But in Worcester, Marshall restricted the scope of application of the doctrine of discovery. According to him, discovery was only applicable between European maritime empires, its purpose being the avoidance of inter-colonial conflict. In other words, discovery did not extinguish the rights of those who were in possession of the territories discovered, and Europeans could only acquire land from North American peoples by purchase. The first colonial charters did not even grant a power to make offensive warfare; only defensive war was within the scope of the power granted to the new settlements.

After having examined the land question during colonial times, Marshall dealt with the issue of North Americans’ capacity for self-government. He affirmed that the peoples of North America governed their own polities. This conclusion logically followed from his previous general statement that European ‘discovery’ had neither extinguished North Americans’ dominium rerum nor their dominium jurisdictionis. Once Marshall had elucidated the questions of North American’s right to land and self-government during European colonial times, it was easy to conclude that, as an heir of Great Britain, the U.S. had also recognized North American peoples as ‘distinct political communities’ with defined boundaries, jurisdiction, and rights over their lands. They were considered as nations and had accordingly the power to sign treaties, a capacity that for Marshall circularly proved their status as independent polities. This conclusion also applied to the Cherokee Nation.

The role of the U.S. with regard to North American peoples was that of a guarantor. The U.S. acted as a ‘big brother’ who protected the weaker but independent political communities that existed within its

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97 Ibid.
98 Ibid., 543-546.
99 Ibid.
100 Ibid., 544.
101 Ibid., 544-546.
102 Ibid., 557, 559
103 Ibid.
104 Ibid., 559-560.
105 Ibid., 561.
106 Ibid.
territory. Citing Vattel, Marshall affirmed that the law of nations did not take away the right of self-government and political independence from a weak nation just because it had decided to seek the protection of a stronger state.\textsuperscript{107} Even if the U.S. wanted to exercise its prerogative of extinguishing North Americans’ rights to land, the former needed the latter’s consent to do so.\textsuperscript{108}

The elucidation of U.S.-North American relations brought to the fore the controversial issue of State power vis-à-vis the federal government. Marshall was categorical in this regard. He first limited State power over North American territory, affirming that ‘Indian territory’ was ‘completely separated from that of the State’.\textsuperscript{109} In addition, he forbade States from ruling North American peoples; it was the exclusive competence of the federal government to directly deal or regulate intercourse with them.\textsuperscript{110}

The legal status of North American peoples in Worcester afforded them a great deal of protection against the acquisitiveness of U.S. settlers moving westward and States avid to acquire their lands. The obligation of the federal government to gain North Americans’ consent in order to dispose of their lands was the ultimate legal guarantee of an autonomous space within which they could live unharmed. Ultimately, however, the protective efforts of the Supreme Court were to not avail: President Andrew Jackson blocked the Supreme Court’s decision.\textsuperscript{111} Unluckily, the ultimate fate of the Cherokee Nation was in the hands of Jackson rather than Marshall.

\textit{Occupation and the Oregon territorial dispute}

The Marshall Trilogy was not the only instance in which stadial theory was used to substantiate legal arguments related to the question of control of the land and the ecosystems of North America during the first half of the nineteenth century. The Oregon territory in the northwest presented a new contest, this time involving mainly the U.S. and Great Britain.

By the beginning of the nineteenth century, Spain and Russia had also made claims to sovereignty in the region,\textsuperscript{112} but both countries eventually dropped their pretensions. Spain was the first to renounce its territorial claims in the Pacific Northwest.\textsuperscript{113} On February 22 1819, the Spanish minister in Washington,

\begin{footnotesize}
\begin{enumerate}
  \item Ibid., 561.
  \item Ibid., 560.
  \item Ibid., 558-559.
  \item Sturgis, \textit{The Trail of Tears}, 38.
  \item Fitzmaurice, \textit{Sovereignty}, 204.
\end{enumerate}
\end{footnotesize}
Luis de Onís, signed the Adam-Onís treaty with the government of the U.S., committing his country to cede any rights in the Pacific coast north of the 42nd parallel.\textsuperscript{114} Soon afterwards, in 1824 and 1825, Russia signed treaties with the U.S. and Great Britain similarly relinquishing all territorial pretension south of the 54° 40’ parallel.\textsuperscript{115}

Great Britain and the U.S. had the more sustained claims to sovereignty in the region. In 1792, Captain George Vancouver and Captain Robert Gray on board of the \textit{Columbia} had navigated the coast of the Pacific North West.\textsuperscript{116} While the former’s expedition reinforced British claims to the territory, Gray’s discovery of the Columbia River established the foundation of U.S. expansionism in the area. Interest in the fur trade elicited the initial claims of both nations to Oregon.\textsuperscript{117} The North West Company (later named the Hudson’s Bay Company) exercised great pressure on the British government to maintain its territorial pretensions in Oregon, especially after it received from the Parliament the monopoly of the fur trade in the region.\textsuperscript{118} In 1811-1812 John Astor, the leader of the Pacific Fur Company, founded the trading post of Astoria at the mouth of the Columbia, fostering the trade interest of the U.S. in the Pacific.\textsuperscript{119}

Tensions between Britain and the U.S. in the Oregon territory escalated after the War of 1812 leading both parties to negotiations in 1818, which were resolved through an agreement that stipulated the joint occupation of the territory.\textsuperscript{120} A new negotiation in 1826-1827 proved inconclusive, with the U.S. offering a line of demarcation of territorial interests at the 49th parallel and the British insistent on drawing that line from the 49th parallel to the Pacific Ocean following the channel of the Columbia River.\textsuperscript{121} The joint occupation of the territory continued after 1827, and there was a long stalemate in negotiations until the 1840s.

With scores of settlers from the U.S. arriving to Oregon in the 1840s the dispute between Britain and the U.S. intensified once again. Land settlements for agriculture in the West provided an escape valve to population pressure in the east and the necessary raw materials to sustain the U.S. economic boom.\textsuperscript{122} Access to the Pacific coast was also seen by U.S. policy makers as essential for U.S. trade with East Asia.

\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid., 129-132. See also Fitzmaurice, \textit{Sovereignty}, 204.
\textsuperscript{116} Merk, \textit{The Oregon Question}, 1-5.
\textsuperscript{117} Ibid., x.
\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid., 5-6.
\textsuperscript{120} Ibid., 27.
\textsuperscript{121} Ibid., 27-29.
\textsuperscript{122} Jeremy Balck, \textit{Fighting for America: The Struggle for Mastery in North America 1519-1871} (Bloomington, Indian University Press, 2011) 231.
and China in particular. For these reasons, the Oregon Question became one of the main issues of debate in the political campaign for the 1844 presidential election, which saw the appointment of James Polk, a devotee of Jackson, to the White House. The new administration resolutely supported U.S. expansionism in the West and advocated a 54° 40’ line of demarcation in the Pacific North West.

Despite the firmness of the U.S. commitment to acquire Oregon, the British did not capitulate. The possibility of a military confrontation grew. But as the threat of war against Mexico also loomed large on the political horizon, the U.S. administration decreased its aggressive stance on the Oregon question. Besides, in the Congress Democrats from the South with investments in the cotton trade were concerned about the prospects of a war against Great Britain that could provoke a significant reduction of British textile imports, thus impairing the cotton industry. At the end, the Whigs (who also opposed war) aligned with the Southern Democrats in the Senate, and together they were able to reopen negotiations with London using a more conciliatory tone.

The British seized the opportunity to end the Oregon controversy once and for all and made a generous offer, one they believed could not be rejected by the U.S. They proposed to fix the line of demarcation of the territorial possession of each country following the 49th parallel from the Rocky Mountains to the Pacific Ocean, safeguarding Vancouver Island as a British possession. In addition, they also demanded a right of navigation for the Hudson’s Bay Company of the Columbian River south of the 49th parallel. That was a palatable alternative for the U.S. as well. So, after the Senate accepted the offer, the U.S. Secretary of State, James Buchanan, and Richard Pakenham, British envoy to the U.S., negotiated a treaty that was ratified by the Senate on 15 June 1846.

123 Ibid., 231.
124 Ibid., 230.
125 Merk, The Oregon Question, 411.
126 Ibid., 412. Fanis has pointed out that transformations in British and US national identity by the 1840s provided the ideological background in which a peaceful resolution of the territorial clash in Oregon became possible. By 1846 the US embraced a new national identity of Romantic Evangelicalism, which came about as a result of industrialization and the need to discipline a growing working class. The belief in Anglo-Saxon racial superiority and the civilizing mission, constitutive parts of the new national ideology, transformed Great Britain into a member of the same family rather than a geopolitical rival. At the same time, the shift in Great Britain from mercantilism to Evangelical free trade enabled an understanding US expansionism and National Destiny as an opportunity for business rather than a commercial threat. Friendly relations, even at the expenses of territorial losses, assured open markets for British industrial products. See Maria Fanis, Secular Morality and International Security: American and British Decisions about War (Ann Arbor, The University of Michigan Press, 2011) 99-166.
127 Merk, The Oregon Question, 412-413.
128 Ibid., 413.
129 Ibid., 413-417.
The Oregon question was a diplomatic conflict fought through legal trenches. During the negotiations different legal theories and rights such as discovery, exploration, and continuity were invoked to substantiate the territorial claims of the parties. While all these grounds played an important role in the legal debates on the Oregon territory dispute, the theory of occupation topped all other competing doctrines on the acquisition of territory. Already in 1822 the Duke of Wellington argued in his letter to Karl Nesselrode that the most reputed contributors to the law of nations agreed that occupation and use were the paramount legal grounds whereby nations could articulate their claims to territory.

The legal theory of occupation was often combined with arguments derived from conjectural history. In his book on the Oregon question, Albert Gallatin (a senior U.S. diplomat who had been in charge of negotiations with the British in 1818 and 1826) wrote that as farmers established permanent settlements in Oregon, hunters and animals disappeared. According to natural law, once an agricultural and industrious population had taken possession of the whole territory, those individuals became sovereigns by virtue of the ‘right of occupancy’. For Gatlin, the law of nations prescribed that the natural resources of Oregon ought to be in the hands of a progressive people, one dedicated to agriculture and industry. For Gatlin, the backwardness that characterized North Americans’ utilization of nature did not afford the legal protection of the law of nations. This claim not only affected the control of North Americans over their territory; it also strategically targeted the British fur trade, which was based on non-progressive productive activity performed by savages.

Sir Traver Twiss, Professor of Political Economy at Oxford, disagreed with Gallatin’s account of the right to occupation. On the one hand, he believed that, according to the law of nations, only nations and not individuals could acquire empire and domain (sovereignty and property) when they seized unoccupied territory. To substantiate his position, he cited Vattel extensively, arguing that individuals could acquire property in an unoccupied country, but never sovereignty over it. It was ridiculous to

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133 Albert Gallatin, *The Oregon Question* (New York, Bartlett & Welford, 1846) 47.
134 Ibid., 47-48.
135 Sir Traver Twiss, *The Oregon Territory, including an account of the convention of the Escurial, also, the treaties and negotiations between the United States and great Britain, held at various times for the settlement of a boundary line and the examination of the whole question in respect to facts and the Law of Nations* (New York, D. Appleton and Co., 1846) 111.
136 Ibid., 112.
suppose, he argued, that individual occupation of vacant lands could trump the rights of nations over the same territory.\textsuperscript{137}

At first sight, Twiss account of occupation seemed to differ from that of Gallatin in a second aspect. Gallatin believed that occupation was valid once an agricultural population displaced a hunting society. For Twiss the right of occupation was limited to the acquisition of a vacant territory or ‘\textit{res nullius}’, that is, a territory which had ‘always been unoccupied’ or after having been occupied was then deserted.\textsuperscript{138} The question that remained to be answered was whether the law of nations recognized North American peoples’ possession and use of their territories as occupation. Twiss also affirmed that the lack of population was a strong indicator of the vacancy of a given territory.\textsuperscript{139} This seemed to suggest that, notwithstanding the degree of social advancement of a particular society, any population present in a territory presumed its occupation. In other words, North Americans’ supposed backwardness could not foreclose the enjoyment of the ecosystems they inhabited.

However, later in his book Twiss used the same argumentative line that Marshall had used in \textit{Johnson v. McIntosh}. He claimed that according to European colonial practice, the first European nation that occupied the lands of ‘savage tribes’—that is, communities that lived ‘by hunting, fishing and roaming habits’—possessed the exclusive right to acquire ‘the soil from the natives by purchase, or cession, or conquest, for the purpose of establishing settlements’.\textsuperscript{140} Twiss also underlined that the modern law of nations was imbued with a more humanitarian spirit. Accordingly, he continued, the exclusive right of European nations against rival colonial powers was weakened into a right of \textit{pre-emption}.\textsuperscript{141}

Twiss’ account of occupation legitimized the displacement of North American people’s use of nature by European colonial nations. Colonial powers could extinguish their right to the soil. That displacement was not only the displacement of one people by another, but also the displacement of a ‘savage’ use of nature by a civilized one. An unproductive utilization of natural resources—epitomized by backward productive practices such as hunting and fishing—had to be substituted by the efficiency of white agricultural settlements. It is striking that a century and a half after Locke, Twiss described the peoples of North America in the same fashion, to wit, as non-agricultural communities.\textsuperscript{142}

\textsuperscript{137} Ibid.
\textsuperscript{138} Ibid., 112-114.
\textsuperscript{139} Ibid., 114.
\textsuperscript{140} Ibid., 177.
\textsuperscript{141} Ibid.
\textsuperscript{142} Twiss referred to savage societies in general. But it is clear that in the context of the debate on the Oregon question that general banner was also used to refer to the peoples of North America.
For Twiss, the contest over Oregon was a territorial dispute between two civilized nations; the presence of North Americans was inconsequential to its resolution. Phillimore, Wheaton, and Ortolan presented the Oregon question in the same fashion as a dispute between Great Britain and the U.S.\textsuperscript{143} In these legal texts North American peoples were utterly invisible. Occupation applied to territory that was described by all these authors as vacant, unoccupied, and open to appropriation.

Twiss and Phillimore had shared views in regard to the Oregon question. As Twiss noted, British acquisitions in the North West were validated by international law because the territory under dispute had not yet been occupied ‘by any other civilized nation’.\textsuperscript{144} In the same vein, Phillimore emphasized the British argument that nations had rights to occupy vacant portions of the Earth, independent of where they were located.\textsuperscript{145}

Similar arguments were aired from the competing camp. On 7 February 1846 Garett Davis, U.S. Senator and chairman of the Committee on Territories, intervened in front of the U.S. House of Representatives. In his speech he went further than Twiss, asserting that:

The earth is the common heritage of mankind, the universal gift of a bounteous God. It is alike the law of reason and of nations, that such portions of it as are not occupied may be appropriated by any people; and Oregon, in 1790, when this Nootka treaty was made, having no people, no government, no laws, no political authority of any kind, but being in a state of unbroken, unsubjugated, primeval solitude, except the occasional landing of traders upon the coast to traffic with the savages, and having so continued for more than two centuries since it was first visited by civilized man from Europe, was open to any race who might seek it for a home and subsistence, to establish their hearths and their altars.\textsuperscript{146}

Davis described Oregon using standards of social advancement characteristic of conjectural history, namely, government, laws, and political authority. In addition, his conclusion that the primeval condition of Oregon legitimized its occupation by any civilized race was strengthened by a religious interpretation of God’s creation. In the same manner as Grotius, Pufendorf, Locke, and Vattel, Davis believed that the

\textsuperscript{143} Phillimore, Commentaries, Part III Ch XII §CCXXVII 199. Ortoland, Des Moyens d’Acquérir, Titre I Chap I III §72 48-49. The Oregon question was not included in the 1836 edition of Wheatons’ Elements of International. But it appeared in subsequent editions. See, for instance, Wheaton, Elements of International Law (London, Little Brown, and Company, 1866) Part II Ch IV §172-§176 250-255.
\textsuperscript{144} Twiss, The Oregon Territory, 252. And he later reiterated this point by defending British settlements in Oregon, a country that was ‘unoccupied by any civilized nation’. Ibid., 260.
\textsuperscript{145} Phillimore, Commentaries, Part III Ch XII §CCXLIX 212.
Earth belonged to humanity as a whole. The only difference with these previous thinkers was the racial undertone of Davis’ pronouncement. But, like them, he believed that the world was given to humans by a generous creator in order to privatize, populate, and improve it. Oregon was a wilderness in which wild savages surely existed, but had not yet created a civil society. Furthermore, they had not left any trace on the surface of that part of the Earth that was worthy of recognition.

Davis went even further, paradoxically suggesting that North American peoples did not even count as inhabitants. On the one hand, he acknowledged their presence, recognizing European trade with them. On the other, he clearly affirmed that Oregon had no people. The fact that North Americans fused with their surrounding wild environment implied that the land they inhabited was not really populated, in the sense of having been improved and marked by civilization. Only economically progressive individuals counted as human beings in the full sense of the term. In North America they belonged to the nation upon which God had bestowed the Manifest Destiny of subduing all of North American nature.

The Oregon territory was not empty. Before Europeans set foot on it, it had been inhabited since the Holocene for thousands of years by successive generations. At the time of European arrival the territory was peopled by fifteen different language groups, comprising a population of between 100,000 to 200,000 inhabitants. They modified the landscapes of the northwest coast of North America through hunting, fishing, cultivation, and the use of fire. They used and managed more than 300 plants, increasing their productivity and using them for food and ceremonial purposes, as well as medicines. Their productive activities and lifestyles had an impact on the natural habitats that surrounded them, but generally maintained the fertility of the land. The belief of the Northwest North Americans that they were part of the grand cycle of life and their love for their land were conducive to a respectful—though not protective—attitude toward nature. Moreover, their impact on nature paled in comparison with

147 Davis fluctuation is evident also in page 11 in which he characterized the northwest coast of North America as ‘an almost boundless unpeopled forest’ and at the same time affirms that it was ‘sparsely peopled by poor savages’. Ibid., 11.
148 For the idea of improving the vacant lands of the West as part of US Manifest Destiny see John R. Van Atta, Securing the West: Politics, Public Lands, and the Fate of the Old Republic (1785-1850). For the link between the Oregon question and the rhetoric of Manifest Destiny see Julius W. Pratt, ‘The Origin of “Manifest Destiny”’ 32 The American Historical Review (1927) 785-798.
152 Turner, Keeping it Living, 331.
153 For this believes see Nelson, Treaties and Treachery, 13.
that of U.S. settlers. Mining, grazing, logging, farming, and uncontrolled fires had an impact on the Northwest ecosystems, larger than any other previously recorded in history.¹⁵⁵

Despite all the activities through which North American communities in the Northwest skillfully modified nature, they were generally perceived by European colonists and their descendants as savages that wandered over the land.¹⁵⁶ This claim—namely, that they could not utilize the natural resources of the Northwest—paved the way for their dispossessio. In 1850 the U.S. Congress passed the Oregon Land Donation Act, whereby every white settler who would work the land in the Oregon territory would receive 320 acres of land.¹⁵⁷ The Act did not recognize North Americans’ pre-existing presence. Five years after the Act, 2.5 million acres of North American territory became the private property of white settlers.¹⁵⁸

With the discovery of gold in Oregon even more settlers avid of land and wealth made inroads into North Americans territory in the North West, using violence if necessary. North Americans retaliated.¹⁵⁹ Disease and wars with the Confederation debilitated North American societies in the Pacific North West. In this context, the U.S. Congress created the Willamette Valley Treaty Commission in 1850 with the objective of negotiating agreements that would grant colonists access to North American land in Oregon.¹⁶⁰ Despite fierce resistance, most groups ended up signing unfavorable treaties in which they ceded more and more territory, and transferred to the U.S. innumerable natural resources which had previously been at their disposal.¹⁶¹

¹⁵⁵ Vale, Fire, 224.
¹⁵⁶ This attitude was shared by the European descendants of British Columbia. In a book published in 1868, Gilbert Malcolm Sproat, a businessman who would eventually become Land Commissioner, summarised the ideas of his contemporaries regarding the occupation of land in the hands of North American peoples. In his chapter on the ‘Rights of Savages to the Soil’ he presented those views, stating that: ‘We often talked about our rights as strangers to take possession of the district . . . The American woodmen . . . discuss the whole question with great clearness . . . They considered that any right in the soil which these natives had as occupiers was partial and imperfect as, with the exception of hunting animals in the forest, plucking wild fruits, and cutting a few trees . . . the natives did not in any civilized sense, occupy the land. It would be unreasonable to suppose, the Americans said, that a body of civilized men . . . could not rightfully settle in a country needing their labors, and peopled only by a fringe of savages on the coast. Unless such a right were presumed to exist, there would be little progress in the world by means of colonization.’ Importantly Sproat did not completely agree with his contemporaries, but acknowledged that ‘the right of intruders’ was justified by some of those considerations.’ See Gilbert Malcolm Sproat, Scenes and Studies of Savage Life (London, Smith, Elder and Co., 1868) 7-8. It is also worth noticing that these views did not come from an ideologue for the ill-treatment of savages. On the contrary, Sproat affirmed that intruders should treat savages with justice and benevolence. Ibid., 8.
¹⁵⁷ Nelson, Treaties and Treachery, 13
¹⁵⁸ Ibid., 24.
¹⁵⁹ Ibid., 19-21.
¹⁶⁰ Ibid., 24-25.
The alleged backwardness of North Americans before the law condemned their practices and understandings of nature to invisibility. The other side of the coin was the strong connection in the minds of U.S. intellectuals and legal scholars between the improvement of nature, social advancement, and U.S. manifest destiny. The law of nations provided the strategic link between Western visions of social progress and the institutions of private property and trade that propelled the kind of exploitative economy that incarnated progress. As North Americans and the wilderness that encircled them rapidly shrank a handful of commentators melancholically lamented the eventual vanishing of their once strong savage neighbors.  

*Savages rediscovered: Australians and colonists’ perceptions*

When on the 28th of April 1770 the *Endeavour*, captained by James Cook, landed at a site they named Botany Bay, he could not imagine the enormity of the 7.78 million square kilometer island-continent on which he had arrived. Cook and his crew were not the first Europeans to ever visit those lands. Since the sixteenth century, European explorers had navigated the seas around Australia. In 1567 the Spanish searched for gold in the Solomon Island with little success. They tried again unsuccessfully in 1595 and 1605, this time landing in the island archipelago of Vanuatu. The Portuguese might have been the first to actually arrive to *Terra Australis*. But their presence in the area ended soon with the arrival of the Dutch, who operated in the western and northern coasts of the continent, which they called *Nova Hollandia* (New Holland). In the mid eighteenth century the French had also started to show interest in the region, sending several scientific expeditions to chart the unknown expanse of the Pacific.

Despite those early contacts, Australia had remained largely untouched by Europeans before Captain James Cook chartered more than 8,000 kilometers of the eastern seaboard and laid claim to the entire coast in 1770. Eighteen years after Cook’s arrival, Captain Arthur Philip commanded a fleet of 11 ships and 1,350 passengers comprising 759 convicts and their guards to Port Jackson. The English claimed and

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164 Ibid.
165 Garden, *Australia*, 64.
166 Ibid.
named the vast area around this first settlement as New South Wales. It was the first permanent English colony in the continent.169

Australia was a penal colony. More than 150,000 convicts were transported during the years that the system operated.170 Convicts were valuable in the new British territory because they provided a free labor force, first for the government and later for private masters.171 In addition to offering the possibility to get rid of a social burden, Australia was a valuable colonial acquisition for the British because it provided an advantageous geographical location to operate in the Pacific and Indian oceans, far from the Dutch sphere of influence in the East Indies.

As with other overseas territories, Australia also offered the possibility of furnishing new commodities of economic value for the Empire. On the first voyage, James Cook was accompanied by Joseph Banks (1743-1820), a young scientist that was to become the most important figure in British colonial botany during his lifetime, and Swedish botanist Daniel Solander (1733-1782), a disciple of the Swedish naturalist Carl Linnaeus (1707-1778) who had famously coined a system of botanical nomenclature.172 Banks and Solander collected hundreds of new species for study.173

Commercial exploitation of valuable species began in the early years of British colonization. At first, it focused on the products obtained from whales (highly prized in European and North American markets) and on the furs from seals.174 Hundreds of thousands of whales were killed. The intensity of the hunt provoked a population crash that negatively impacted the new-born industry.175 In addition to whales, approximately 250,000 seals were slaughtered.176 The extinction of some minor species and the decimation of others resulted in the swift collapse of the fur industry.177

The first decades of the new colony were a time of hardship. In contrast, from the 1830s the Australian colonies received millions of pounds of British investment.178 In fact, they were the second biggest

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171 Ibid., 19.
174 Garden, Australia, 78.
175 Ibid.
177 Garden, Australia, 78.
recipient of capital in the British Empire after India.\footnote{Ibid.} That supply of money transformed life in the colonies and soon Australian settlers achieved one of the highest standards of living in the world at the time. But abundance was achieved at the expense of natural resources: Australian nature suffered the vigorous impact of the colonists’ acquisitiveness.

British colonists not only found an alien environment in Australia, but also an unknown and large population. They were part of an even larger group of people that had been using that environment to their convenience for thousands of years. The peoples of Australia\footnote{This term and its synonyms (Australians, Australian peoples) include both the so-called ‘aboriginals’ and the Torres Strait islanders. For coherence and terminological parity with the people of European descent (who I have called Europeans) I retain the single continental denomination of different pre-colonial groups that I have used throughout the dissertation.} had first arrived to the continent between 40,000 BP and 60,000 BP.\footnote{Noel G. Butlin, \textit{Economics and the Dreamtime: A Hypothetical History} (Cambridge, Cambridge University Press, 1993) 9.} The size of the pre-contact population in 1788 remains disputed, but most authors agree on figure between 300,000 and 1.5 million.\footnote{See \textit{supra} Chapter 1, page 53.} This population manipulated the environment, adapting it to its needs.

Despite Australians sustainable adaptation of the natural habitats they inhabited, they had also a clear impact on the natural environment.\footnote{See \textit{supra} Chapter 1, pages 54-56.} How is it then possible that the idea that Australians fussed with their wild habitats has persisted until so very recently?\footnote{Australian simplicity is celebrated in Alan Moorehead, \textit{The Fatal Impact: The Invasion of the South Pacific 1767-1840} (Melbourne, Mead & Beckett Publishing, 1983) 143-159. In its foreword to the book \textit{Australia the Beautiful, Wilderness}, Bob Brown affirms: ‘Two hundred years ago Australia, the world’s smallest continent, was all wilderness. Its people lived in wilderness. They were part of it.’ See Allan Moul and Leo Meier, \textit{Australia the Beautiful, Wilderness} (Sydney, Weldon, 1983) 12-13.} When did this idea originate and how did it take form? What were its legal and political effects in the context of British imperialism?

The idea of Australia as an empty land waiting to be settled, with a crude and backward pre-contact population that lived in a kind of ‘state of nature’, has deep colonial roots. In spite of this fact, during the nineteenth century several settlers and explorers recognized that Australians pertinently managed their lands and modified the environment. Convict painter Joseph Lulcett, for instance, portrayed a group of Awakabal people using fire to hunt kangaroos.\footnote{Head, \textit{Second Nature}, 118.} Similarly, other paintings of the time represented Australian as ‘people in possession and full enjoyment of their lands’.\footnote{Jeannette Horn, ‘Exposing the Lie of Terra Nullius: Joseph Lycett’s Awakabal Album’ 31 \textit{Art and Australia} (1993) 77-83, 78.} Explorer and geologist Paul Edmund de Strzelecki, ethnologists James Cowles Prichard, Albert Cort Haddon, and polymath John
Lubbock recognized that the Australian peoples had a distinctive system of land ownership and a special connection to the lands they inhabited. Haddon also noted that Australians cultivated certain plants like purslane, though not the soil.

Important as they were, these testimonies constituted mere islands of recognition in a sea of denial. Moreover, the fact that early colonial account of Australia recognized the pre-colonial population as proprietors did not mean that they regarded them as a socially advanced population. Lubbock, for example, noted the paradoxical situation that Australians unlike North Americans had individual property rights over land, despite the fact that they were much lower on the scale of social evolution.

But soon after the early benevolent testimonies of Australians, the imposition of the ideological label of ‘savages’ erased whatever entitlement to possess and use their ecosystems that Europeans may have recognized. Already Captain Cook had described Australian peoples as a timorous, naked, and non-agricultural race. But Cook’s picture of the Australians was not somber. Their simplicity had a positive corollary. They had not experienced the extremes of opulence and social inequality that, according to him and several Enlightenment intellectuals, characterized the European society of his time. Hence, they were considerably happier than contemporary Europeans; aborigines were content with what nature had furnished them with. Their lack of greed protected them against the social suffering caused by the craving for riches and material affluence characteristic of advanced nations.

By the beginning of the nineteenth century accounts of the Australian population were far less rosy. Evangelical missionary work in the Pacific negatively affected the perception of Australians. Missionaries had travelled to the new British possessions in order to bring civilization and salvation to a fallen race rather than to learn from a dignified ‘Other’. The attitude of missionaries was based on the

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188 Haddon, *The Races of Man*, 22.


192 Ibid., 508 and Ibid., 251.

certitude of Australians’ inferiority. Fortunately, their mission of converting and enlightening the pre-colonial populations prevented them from turning this difference into an excuse for harsh treatment.

So it was still possible to find during the first decades of British settlement influential individuals such as Governor Macquarie who believed that with gentleness and persuasion the peoples of Australia could be assimilated into the new colonial society.¹⁹⁴ Once civilized, the peoples of Australia could become useful for the new British colonies in Australia.¹⁹⁵ Learning industriousness and the arts from the British settlers would, for instance, allow them to find a place within the labor structure of the new colonial economy.¹⁹⁶

Not everybody believed that civilizing the Australians was feasible. In the view of Barron Field, Judge of the Supreme Court of New South Wales, the peoples of Australia were irredeemable. They could not be civilized because of their deficient rationality and natural savage instincts.¹⁹⁷ Peter Miller Cunningham, pioneer and commentator, went further than Field, speculating that the animal state of the peoples of Australia and their deficiency in the mechanical arts in comparison to other savages suggested that they could well be the missing link between man and monkey.¹⁹⁸ That was visible in ‘some of the old women’ who ‘only seem to require a tail to complete the identity’.¹⁹⁹

The fluid social identity of Australians was superseded following the voyages of Cook by a depoliticized and ahistorical colonial identity within the British Empire, built on the perceptions of the pioneers, explorers, officers, and scientists who came in contact with them. At the same time, the various individuals that studied and described the peoples of Australia were influenced by the intellectual ideas that circulated in metropolitan circles about non-European peoples and the function, place, and treatment they should be afforded in the British Empire. One of these sets of ideas, based on Enlightenment stadial theory, was used to justify their dispossession.

¹⁹⁵ Ibid.
¹⁹⁶ Ibid.
¹⁹⁹ Ibid., 46.
Jackson’s grand scheme of removing all North American peoples east of the Mississippi had been hunting the Cherokee for decades.200 Fearing that they were going to eventually be forced to abandon the territory where they lived, the Cherokee had been ceding land for decades in an attempt to appease land hungry settlers. But their efforts were in vain: both settlers and the Georgia state continued to demand more and more land. Unluckily for the Cherokee, the discovery of gold in their territory only exacerbated the growing appetite for land.201

On December 28, 1835, an unauthorized minority faction of the Cherokee Nation signed the treaty of New Echota with the U.S., committing to leave their territory within a period of two years.202 Eventually, in 1837 and 1838, under the office of President Martin Van Burden (Vice-President under Andrew Jackson), the Cherokee were forced to migrate in an exodus famously—or rather, infamously—known as the Trail of Tears.203 This forced migration provoked a high mortality rate. It is estimated that of the 15,000 Cherokee that left their land (accompanied by 1,600 slaves), between 2,000 and 8,000 died as direct consequence of walking the Trail of Tears.204

None other than John Stuart Mill defended the forced migration of ‘Indian tribes’. Replying to articles in the Times and the Standard which criticized removal and alternatively proposed a policy of civilization, James endorsed the policies of the federal government. He first described the belief of the Union that the lands in possessions of the ‘Indians’ needed to be allocated to civilized settlers for agriculture.205 In exchange, ‘Indians’ were going to obtain new lands and keep them forever. Mill argued that removal was legitimate. Mill had always believed in the cosmopolitan need for an efficient utilization of unproductive land. Accordingly, he did not criticize the rationale of removal defended by the federal government. In addition, he believed that the government of the Union had treated North American peoples in an


202 Ibid., 219-235.

203 The literature on the exodus is vast. For a recent and general account see Julia Coates, Trail of Tears (Santa Barbara, Greenwood, 2014).

204 Coates offers a figure of between 2,000 and 2,500. See Coates, Trail of Tears, 134. The traditional number of casualties is 4,000. See Sturgis, The Trail of Tears, 2. An estimate of 8,000 people can be found in Russell Thornton, ‘The Demography of the Trail of Tears Period: A New Estimate of Cherokee Population Losses’ William J. Anderson (ed.), Cherokee Removal: Before and After (Athens, University of Georgia Press, 1991) 92–93.

205 Mill, CW, XXII, Conduct of the United States towards the Indian Tribes, Examiner, 9 Jan., 1831, 236.
honorable manner and had invested a lot of resources in their civilization. North American peoples would be better off after removal had separated them from the jurisdiction of the State and placed them under the protecting umbrella of the Federation.

Even Marshall, despite his legal defense of North Americans’ right to property, was far from advocating the parity of North American polities and the U.S. In *Worcester v. Georgia*, Marshall’s characterization of both nations evidenced an understanding of social formations informed by a progressive philosophy of history. In his account, North American polities figured as weak nations that needed the protection of the strong U.S. from external incursions ‘into their country’. Moreover, because of their savage condition, they also needed the U.S. to furnish them with the necessities of life. This situation was the same at the time of European colonialism. Due to North Americans’ backward productive activities they could not enjoy the basic comforts of a civilized life.

For this reason, Congress launched a program to civilize North Americans. The way to do so was by turning them from wandering hunters into settled agriculturalists. That policy was also implemented in the Cherokee Nation. According to Marshall, that scheme of cultural, economic, and social transformation had started to bear fruit: the Cherokee ‘had already made considerable progress in this improvement … Their advance in the "habits and arts of civilization," rather encouraged perseverance in the laudable exertions still farther to meliorate their condition.’ Marshall’s stereotypes about North American peoples, similar to those of the executive, neglected the fact that the Cherokees had permanent settlements and practiced agriculture long before the first Europeans ever set foot in North America. Those stereotypes neglected who North Americans really were, while encouraging the imposition of the ‘progressive’ model over their identities.

Justice McLean also commended the laudable attempt of the Federal Government to civilize North American peoples by helping them advance from ‘the hunter state’ in which they lived toward that of ‘the agriculturalist and herdsman’. North Americans, or ‘the children of the wilderness’ as he referred to

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206 Ibid., 236-237.
207 Ibid., 237.
209 Ibid. For the various services that North American savagery performed in *Worcester* see Williams Jr., *Like a Loaded Weapon*, 66-70.
211 Ibid., 557.
212 Ibid.
213 Ibid.
214 Oswalt, *This Land Was Theirs*, 396-420.
them, would be uplifted by abandoning nomadic life and embracing civilization, private property, and productive activities that helped in managing and trading natural resources.  

McLean’s views about North American peoples, although more extreme than Marshall’s, evidenced a similar adherence to the main tenets of stadial theory. But McLean went further than Marshall, also defending the legal validity of the agricultural argument. According to McLean, it was an indisputable principle of natural law, which he regarded as the highest source of normativity, that peoples or communities that lived in the hunter stage ought to be confined within narrow territorial limits in the case that others who were in a more pressing need of their vast territories (and the natural resources those territories contained) attempted to acquire them. McLean was here paraphrasing Vattel’s conclusions about the applicability of the agricultural argument in North America.

In practice, McLean noticed, the settlement of North America had not been carried out according to this legal principle. European states and colonists chose a more ‘conciliatory’ course of action, acquiring North American’s territories by contract and purchase. Land was also taken in the aftermath of warfare by application of the laws of war. To be sure, McLean explained that the use of these legal mechanisms for the settlement of North America did not mean that the agricultural argument was not a legitimate method of acquiring territory. It only meant that it may have not been the most expedient way for colonists who were not powerful enough to impose their prerogative.

Marshall, as Vitoria had done several centuries before him, recognized the possibility that non-Europeans had pre-colonial natural rights of private property. This undoubtedly prevented greedy individuals from acquiring their property and disposing them of their natural resources. Both Vitoria and Marshall were conscious of the threat that an unruly taking of lands from the peoples of Latin America and North America could pose to their respective states. For Vitoria and the Dominicans, aligning with the Spanish Crown and limiting the power of the conquistadores in Latin America was essential in order to promote a more benign colonization, one in tune with the imperative of Catholic evangelization, the worldview that informed the Dominican vision of Spanish Empire. Marshall, for his part, was well aware that an increase of State power over North American affairs could end up fracturing the Confederacy.

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216 Ibid., 588.
217 Ibid., 579.
218 Ibid., 580.
219 Ibid.
220 Ibid., 579.
Again similar to Vitoria, Marshall’s conclusion that the peoples of North America were the proprietors of the soil retrospectively projected the institution of private property over land and other natural resources to describe the way in which the peoples of North America had traditionally related to the ecosystems they used. Once the relationship between North American peoples and their natural habitats was re-conceptualized as one of proprietorship, the natural habitats of North America became either private or privatizable. In other words, North American nature became commoditized, and therefore all natural elements entered the realm of goods that could be object of trade. In the context of U.S. expansion, the legal redefinition of nature as a commodity allowed the federal government to purchase as much land as possible from North American peoples, something that became easier and easier as the balance of military power tipped in favor of the U.S.

The legal fiction of North Americans’ ownership of nature allowed the change of hands from North American polities to the colonists or the U.S. to be presented as occurring in a continuum. This fact hid the great divergences that existed between the way nature and the relationship between humans and nature was understood and conceptualized in North American (with all the nuances and variations that existed within this vast and heterogeneous group) and European societies—or societies of European descent like the U.S. The Cherokee, for example, considered that they were part of and belonged to the natural world that surrounded them. Even though they had rights of use of the land, there was not clear separation between the natural and social realm, and, hence, no conception of human superiority over nature. Despite a cosmology rife with conflict, Perdue and Green affirmed that ‘the creation stories of the Cherokees emphasized the importance of respect for other living things, not dominion over them’. The Cherokee, as with many other communities, had a sense of territoriality linked to the natural spaces from which they sought sustenance. Eventually they adopted many of the ways of the Europeans and

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222 Theda Perdue and Michael Green, The Cherokee Nation and The Trail of Tears (New York, Penguin Group 2008) 5-7. See also Coates, Trail of Tears, 3.

223 Of course this does not mean that the Cherokees, like most North American peoples, did not use nature intensively. As Garrison remarks, ‘the Cherokee thus used the land and its products in accordance with their spiritual beliefs; environmental care was not a moral directive, but a consequence of the overarching worldview’. See Garrison, The Legal Ideology of Removal, 37.

224 Perdue and Green, The Cherokee Nation, 4.

225 The Cherokee used their surroundings diligently. They mastered the medicinal uses of more than eight hundred herbs. Ibid. Women were skillful collectors of a wide array of natural products. See Stremlau, Sustaining the Cherokee Family 24;
their descendants in order to safeguard their groups and improve their standard of living. One of the notions that they acquired was the conception of landed property. But even after adopting the idea of ownership of their lands, they still retained a collective approach. For the Cherokee, their territory belonged to the whole group. In other words, land could not be owned by particular members of the community. This is why the private division of their land and other civilizing measures in reservations and Indian Territory represented the ultimate attack on North Americans’ way of life, constituting a violent attempt to erase their singularity.

From Vitoria’s *De Indis* to the ‘Marshall Trilogy’, the law of nations remained blind to the different worldviews and understandings of nature in non-European societies. At the same time, the more exploitative relationship to nature that the growing U.S. economy demanded, anchored on the right to privatize and trade whole ecosystems and their constitutive natural elements, received international validation. The law of nations conferred legal protection to those institutions and the nations that embraced them, projecting them on a global scale through the self-arrogated mission of exploiting nature to create civilization.

It would be disingenuous to claim that either Vitoria or Marshall were consciously attempting to privatize the territory of North America. Within the worldview that made sense to them, the only way in which they could protect the peoples of America and their territories from encroachment (however secondary this protection was to other interests at play) was by conceptualizing—and, hence, by inadvertently transforming—North Americans’ relation to nature into a private relationship of ownership, an institution with an old pedigree that was sacrosanct in the European as well as the U.S. legal imagination. All in all, it was their conviction that Latin and North American polities were inferior to Europeans that prevented them from understanding the former’s use of nature as socially advanced or progressive. The backwardness of their practices and their understanding of nature was taken for granted. This disadvantageous position foreclosed the inclusion of their views and practices into a universal legal vocabulary that ultimately remained utterly Eurocentric.


226 They did so to such a degree that they were considered as part of the Five Civilized Tribes. The other communities included in this category were the Creek, Chickasaw, Chocktaw, and Seminole. See Ann Byers, *The Trail of Tears: A Primary Source History of the Forced Relocation of the Cherokee Nation* (New York, The Rosen Publishing Group, 2004) 8.

227 Vicky Rozema (ed.), *Voices from the Trail of Tears* (Winston-Salem, John F. Blair Publisher, 2003) 42.

228 One of the key policies for the total assimilation of North Americans was the privatization of communal land through allotment. See Ibid., 1-19.
The uncontrolled freedom of nature: stadial theory and occupation in Australia

Upon their arrival to Australia, the British claimed sovereignty over half of the continent and handed jurisdiction to the governor of New South Wales and its courts. Unlike any of their other colonies, in Australia the British never signed treaties with its inhabitants. Britain arrogated and claimed the rights to settle, govern, and own the territories of which they took possession.

British colonization had a traumatic impact on the Australian peoples who first came in contact with the colonists. The extension of British power sent reverberating waves throughout the continent. The most severe effect of the colonial encounter was the extremely high mortality rate among Australians. Mortality figures vary depending on authors, but the general consensus is that the pre-colonial population of Australia was reduced from a figure of 300,000-1.5 million people in 1788 to 58,000 and 19,000 by 1920, before slowly starting to recover. Independent of the historical data one relies on, the glaring fact of the disappearance of between 80 and 96 percent of the pre-colonial population amounts to the almost total destruction of a whole—if very varied—group of peoples.

The main causes of death were contagious diseases, sexual abuse of women and girls, and direct violence. Tens of thousands died at the hands of English colonists. Only in Queensland, British settlers

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231 Notwithstanding the high rates of deaths, it is disputed if the decline of the pre-colonial population of Australia amounts to genocide. For an interesting discussion on imperialism and genocide see Moses, Empire, Colony, Genocide. In the same volume there is an illuminating discussion of the genocidal character of settler imperialism and the case of Australia, see Norbert Finzsch, “‘The Aborigines … Were Never Annihilated, And Still They Are Becoming Extinct’ Settler Imperialism and Genocide in Nineteenth-century America and Australia’, 253-270. The literature on Australian history and genocide is vast. Among the authors that affirmed that the decimation of the pre-colonial population amounts to genocide, see, for instance, Tatz, ‘Genocide’; A. Dirk Moses, ‘An Antipodean Genocide? The Origins of the Genocidal Moment in the Colonization of Australia’ 2 Journal of Genocide Research (2000) 89-106; Tony Barta, ‘Sorry and not Sorry in Australia, How the Apology to the Stolen Generation Buried a History of Genocide’ 10 Journal of Genocide Research (2008) 201-214. Krieken used the term ‘cultural genocide’ to refer to the Australian case, see Robert van Krieken ‘Cultural Genocide in Australia’ in Dan Stone (ed.), The Historiography of Genocide (Basingstoke, Palgrave Macmillan, 2008) 128-15. Authors like Short argue that the genocide is still ongoing: see Damien Short, ‘Australia: A continuing Genocide?’ 12 Journal of Genocide Research (2010) 45-68. There are also authors like Richard Broome who do not believed that genocide ever took place in Australia because there was no express governmental policy of extermination: see Richard Broome, Aboriginal Victorians: A History Since 1800 (Sydney, Allen & Unwin, 2005) 84. Some like Marcus prefer to use the word ‘ethnocide’, arguing that the case of the death of the majority of Australian pre-colonial inhabitants does not suit all the requirements of a genocide: see Andrew Marcus, ‘Genocide in Australia’ 25 Aboriginal History (2001) 57-69.

232 Harris, ‘Hiding the Bodies’, 83.
killed 10,000 Australians between 1850 and 1900.\textsuperscript{233} Many women and young girls perished as victims of venereal diseases (which were uncommon among Australian peoples before European arrival) and sexual violence. Social and cultural dislocation in the aftermath of colonization exacerbated the impact of germs and colonist violence.\textsuperscript{234} The rupture of the social fabric in which the lives of Australian peoples were knitted continued well into the twentieth century when thousands of their children were forcibly removed from their families and allocated to British families in an effort to assimilate them into British culture.\textsuperscript{235}

A further factor that aggravated the impact of the English was the dispossession of land. Displacement from their habitats affected Australian peoples in various ways. To start with, much of the violence perpetrated against Australian peoples came about in reply to their resistance against the takeover of their territories.\textsuperscript{236} Besides, the impossibility of accessing fertile land to satisfy their food requirements provoked undernourishment and, in some cases, even led to starvation.\textsuperscript{237} In this sense, Lisa Ford has argued that ‘for indigenous people, conflict revolved around life-or-death access to resources, access hampered by settlers’ occupation of land, their monopolization of water, and their relentless destruction of animal habitats’.\textsuperscript{238}

For Australian peoples nature was much more than a mere source of provision: it had intertwined social, cultural, and spiritual meanings and values that contributed to the formation of their identity. Losing this was tantamount to being deprived of a limb or losing one of the pillars that held the social edifice together. Alcohol addiction became the most conspicuous symptom of the acute collective and

\textsuperscript{234} Ibid., 23.
\textsuperscript{236} Tazt, ‘Genocide’, 60.
\textsuperscript{237} Lewis, \textit{The Peoples’ Health}, 23.
\textsuperscript{238} Ford, \textit{Settler Sovereignty}, 8.
individual suffering that resulted from Australians’ loss of lives, space, and self, and their segregation from the new white colonial society.

Dispossession was not a planned course of action specifically designed by the British for the colonization of Australia. In fact, throughout the seventeenth and eighteenth centuries British imperial authority over non-European peoples was to a large degree based on mutual consent. Treaties, protocols, and similar instruments gave legal validity to reciprocal if uneven relationships. In North America, colonists generally acquired the land through purchase rather than first taking (original occupation). But more often than not, non-European peoples entered into unjust agreements and took part in one-sided sales. North American peoples, for instance, gave away more land and natural resources than they would have wanted to. European diseases debilitated their societies, placing them from the outset in a disadvantageous bargaining position vis-à-vis the British and eventually the U.S. In this sense, Banner has observed that most treaties in North America were characterized by coercion rather than informed and free agreement.

The policy of considering non-European peoples as owners of the territories they used and occupied influenced the instructions given to Captain Cook before his voyages to the Pacific by James Douglas, 14th Earl of Morton and the President of the Royal Society (which sponsored Cook’s first voyage to the Pacific), to treat the ‘Native’ that he may find with care and to ‘exercise the utmost patience and forbearance’ with them. He was also instructed to do his utmost to avoid any act of violence against them. Moreover, the ‘Natives’ were, in the words of Douglas, the natural and ‘legal possessors of the several Regions they inhabited’. Consequently, Europeans could not exercise any right of free occupancy. In other words, settlements could only be established based on free consent. In the same vein, the dispatches of Governor Philips to London show a peaceful and gentle approach toward the peoples of Australia. He often asserted that he tried to refrain from using violence against a population that, according to his own words, he had always considered ‘friendly’.

240 Stuart Banner, Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska (Cambridge, Harvard University Press, 2007) 2.
242 Ibid.
243 Ibid.
244 Ibid.
However, the initial approach of the British soon changed for a number of reasons. First, Cook and other explorers reported that Australia was sparsely populated. Second, the first accounts from Australia described the social state of the pre-colonial population as lower than that of any other people encountered before. Additionally, the British also noted that pre-colonial Australian polities were not large enough to present a military threat to Europeans. Finally, the well-armed expedition that the British sent to colonize New South Wales had the power to impose its terms on the ground.\textsuperscript{246} Due to all these factors, the British did not need to buy the land.\textsuperscript{247} That approach contrasted to the one taken in colonial North America. There, colonists proceeded often ahead of government, making deals and frequently operating outside the colonial government’s control and protection. The ad-hoc way in which colonization proceeded built its own momentum. Once colonists acquired land from non-Europeans or alternatively directly purchased it from the Crown, reversing the initial course of action proved difficult in the volatile social context that often characterized the first decades of colonial settlements.\textsuperscript{248}

So when in 1787 Arthur Philips travelled with the first settlers to Australia, they immediately began to land grab. The British stuck to the legal fiction that the Crown was the proprietor of the continent. The growth of the new colony during the first decades of settlement was conditioned to find commodities that could be exportable to international markets.\textsuperscript{249} From the 1820s, the textile industry in England started booming. This development was crucial for Australia. International demand for animal textiles, cheap land, and forced labor provided a suitable basis for the profitability of large-scale wool production.\textsuperscript{250} The demand for wool soon skyrocketed, and with the drop in the duty of wool coming from Australia in 1822, millions of sheep started to fill Australian landscapes.\textsuperscript{251} Plantation agriculture and mining were also important in the initial development of a colonial economy largely dependent on Australian natural resources.\textsuperscript{252}

British settlers seized the land upon their arrival to Australia. How did they justify it? What legal grounds did they invoke? Until recently, historians commonly assumed that British authorities had labeled Australia \textit{terra nullius}—that is, a territory belonging to no one—at the time of first contact.\textsuperscript{253} Allegedly,

\begin{itemize}
  \item \textsuperscript{246} Ibid., 26.
  \item \textsuperscript{247} See Banner, \textit{Possessing the Pacific}, 13-47.
  \item \textsuperscript{248} Ibid., 45-46.
  \item \textsuperscript{249} David Meredith and Deborah Oxl
  \item \textsuperscript{250} Ibid., 112.
  \item \textsuperscript{251} Barta, ‘Relations of Genocide’, 240.
  \item \textsuperscript{252} Jakob B. Madsen, ‘Australia Economic Growth and its Drivers since European Settlement’ in Ville and Withers, \textit{The Cambridge Economic History}, 29-51, 29-30.
  \item \textsuperscript{253} This was the thesis popularised by Henry Reynolds in \textit{The Law of the Land} (Victoria, Penguin Books, 1983) 12-14.
\end{itemize}
the British knew that Australia was inhabited but they used the doctrine of *terra nullius* to claim that the peoples of Australia had never been in possession of the land. Even though this way of thinking was widespread among the colonists, it is now clear that the British did not really use the notion of *terra nullius* as a legal ground to dispossess the peoples of Australia. The term was only applied much later by the Privy Council in 1889 (*Cooper v. Stuart*) to Australian lands considered ‘practically unoccupied’. In academic circles, the question of whether Australia had been *terra nullius* at the time of British occupation was debated as late as 1939.

The English did not regard Australians as owners of their territories. This attitude was not the result of the direct application of any specific legal concept, but was derived from the use of a particular conceptual framework to understand non-European societies. Those ideas were later translated into legal terms. The practical application of this ideological apparatus entailed a general appraisal of the degree of sophistication of pre-colonial Australian societies. The information assembled about Australians was inserted within a progressive social scale informed by a particular philosophy of history that ranked societies according to their level of material advancement. In Australasia, that evaluation took place from the very outset of British exploration and settlement. This is attested by the hints given to Cook by Lord Morton, which formed part of a larger corpus of instructions whereby the Royal Society detailed the features of non-European peoples that English expeditions were expected to record and report back on during their ‘trips of discovery’ around the world.

Morton mentioned a vast array of elements that Cook ought to observe and register, the analysis of which could provide juicy information about the level of civilization of non-European populations. These elements included dress, food, habitation, weapons, religion, morals, order, government and distinctions of power, police, mechanics, tools, arts, and science. The number of inhabitants was also a relevant

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254 Ibid.
256 14 App Case 286, as cited in Bruce Kercher, ‘The Origins of the Myth of Terra Nullius in Early New South Wales Courts’ in Gregory Blue, Martin Bunton and Ralph Crozier (eds.), *Colonialism and the Modern World: Selected Studies* (Armonk, M. E. Sharpe, 2002) 100-119, 101. An earlier case of 1836, *R v Murrell and Bummaree* 1 Legge 72; NSW SupC 25, seems to have been the first one to deal with the application of the doctrine of *terra nullius*. See Ibid., 108.
258 See supra footnote 242.
260 These elements were included in the hints given to Cook. See Beaglehole (ed.), *The Journals*, Vol I Appendix II 516-517.
factor due to the assumed correlation between population density and civilization. The more populous a territory was, the more civilized it was supposed to be. Only a refined economy could feed large numbers of people. Conversely, a sparse population was almost always indicative of the existence of a savage nation.

The journals of Captain Cook contained several descriptions of the peoples of Australia that presented them as a tiny population. They wore very simple clothes, had rudimentary weapons, and lived in primitive huts. The metaphor of the state of nature, the hypothetical condition in which humans lived before coming together to form a civil society, was often used to describe them. It is interesting that Cook and Phillips applied this concept to the land rather than to its population. His conclusion was that Australia was ‘in the pure state of nature’. Its population fused with the wild ecosystems in which they lived and did not leave any trace on the landscapes. Governor Philips used the same expression when talking about the state of the new British territory. James Grant, an official of the British Royal Navy and explorer, explained in the account of his voyage of discovery that Australians, like other savages, lived in ‘the state of nature’. David Collins, one of the founders of New South Wales and Secretary, Lieutenant Governor, and first Judge of the Colony, concurred. The British had found the pre-colonial population of Botany Bay, Port Jackson and Broken Bay (the terms with which the British renamed those territories) in the pure ‘state of nature’.

Like Cook, all the early accounts of colonization described the pre-colonial population of Australia as a very crude and savage people. Phillips noted that they were amicable, naked, and had simple huts and instruments. But in contrast to Cook he pointed out that they were far more numerous than had been predicted. He presumed that the interior of the continent was equally as inhabited as the coast.

Notwithstanding the relevance of all the social aspects contained in the long list provided by Morton, as well as the importance of population size, the existence of currency and commerce were of foremost importance when evaluating the kind of societies that existed in Australia. These social institutions

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261 Ibid., 197, 396-399.
262 Ibid., 397.
264 James Grant, The Narrative of a Voyage of Discovery Performed in his Majesty Vessel the Lady Nelson, of Sixty tons Burthen, with Sliding Keels, in the years 1800, 1801 and 1802, to New South Wales (London, for T. Egerton, 1803)167.
266 Ibid., 28.
267 Ibid., 56.
268 These two elements were included into the hints given to Cook. See Beaglehole (ed.), The Journals, Vol I Appendix II 517.
were significant because in the European intellectual tradition the existence of an exchange economy implied relations of private property, which in turn evidenced the existence of laws that regulated ownership and a system of government that could enforce proprietary rights.269

In addition, commerce was not only a mode of subsistence. In the European imagination it was also a social category related to historical progress, a stage characterized by social complexity and progress. Stadial theory influenced the perception that British metropolitan political elites, colonial administrators, and settlers alike had of the inhabitants of New Holland. The belief that societies progressed through different stages of production did not fade away at the end of the eighteenth century, but was recast—albeit in a slightly different form—by nineteenth-century intellectuals of the first half of the century such as James and John Stuart Mill. It also figured prominently in the legal texts of British lawyers at the turn of the nineteenth century. Even religious people such as the Archbishop of Canterbury John Bird Sumner used a stadial theoretical framework to explain the story of Adam, and others like Thomas Clamers combined philosophical history and political economy with Christianity.270

The centrality of commerce in conjectural history explains, for example, why in Cooks’ voyages the possibility of establishing trade with the inhabitants of Tahiti and New Zealand but not of New Holland was a decisive factor in considering the latter lower in the scale of social advancement.271 Moreover, Cook even believed that the ‘Country’ as such did not offer tradable commodities that could be of interest to the Crown.272 Having no commodities with which to bargain with the newcomers, the importance of the peoples of Australia as possible trading partners diminished considerably. For this reason, direct access to the land was crucial.273

Once it was evident that the peoples of Australia were not a commercial society, it remained to be seen whether they had advanced as far as the agricultural stage of civilization, owning land and cultivating it. Again, in this respect they lost in comparison with the Māoris, who the English always regarded as cultivators of the soil.274 In the journals of his trip on the Endeavour Captain Cook described

271 Ibid., 391-392. Cook was convinced that the peoples of Australia were not interested in exchanging goods. See Beaglehole (ed.), The Journals, Vol I, 398-399.
272 Ibid., 397.
273 For a similar view see Weaver, The Great Land Rush, 141.
274 See Mark Hickford, Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire (Oxford, Oxford University Press, 2011) 56, 96. The fact that the Māori were recognized as limited agriculturalists did not imply that they were automatically considered as civilized. The British used the absence of a plough system to characterize them as ambivalent savages. See Ibid., 95-96.
Australians as fishing, hunting, and gathering communities. For Cook they were ‘like wild beasts’ moving constantly in search for food and depending solely on their daily catch for subsistence. It was also obvious from the descriptions of Governor Philips that they had no knowledge of agriculture.

The state of nature in which Cook found Australia opened the possibility for the exploitation of Australian natural habitats. In the Australian state of nature, Cook remarked, there was ample space for the planting and cultivation of ‘Grain, Fruits, and Roots’. Australia was wild but abundant at the same time. The grasslands offered good prospects for the introduction of cattle. All in all, applying the ‘hand of industry’, to use Cook’s words, to the vacant lands and ecosystems of Australia could provide succulent dividends to the British Empire, hence fostering its economic prosperity.

Living in the state of nature, in backward communities, with a rudimentary material culture and no knowledge of trade or agriculture, the peoples of Australia appeared to British eyes as creatures of nature in need of civilization. A humanitarian sentiment toward the peoples of Australia appeared in the dispatches of the first British governors of New South Wales. Governor Macquarie’s sympathy toward the pre-colonial population crystallized into a program of civilization destined to lift them from the abject condition in which they lived. He claimed that:

Scarcely Emerged from the remotest State of rude and Uncultivated Nature, these People appear to possess some Qualities, which, if properly Cultivated and Encouraged Might render them not only less Wretched and destitute by Reason of their Wild Wandering and Unsettle Habits, but progressively Useful to the Country According to their Capabilities either as Laborers in Agricultural Employ or among the lower class of Mechanics.

Turning Australians from a society of savage hunter-gatherers to an agriculture and industrial people was a vital component of the program of civilizing the ‘Uncultivated Race’. For Macquarie, the indolence of the savage Australians translated into a careless attitude toward future provision. Therefore, the hard working British ought to mentor them, and teaching economic planning and industriousness. Macquarie firmly believed in their capacity to improve, and thus he proposed to the British government

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276 Ibid., 396.
277 Ibid., 397.
278 Ibid.
279 Ibid.
280 Historical Records, Vol VIII 368. Capitalization in the original version.
281 Ibid.
282 Ibid.
283 Ibid., 467.
an experiment in civilization, part of which consisted of allocating some land in which Australians could settle and cultivate the ground.²⁸⁴

A specific philosophy of history provided the matrix in which the interplay between European notions of agriculture, savagery, improvement, and civilization were used to make sense of and manage the pre-colonial Australian population. According to Macquarie, many Australians were keen on civilization, and with patience and gentleness those repugnant to it could be convinced otherwise.²⁸⁵ The conceptual vocabulary of stadialism was not privative of the colonial government.

In New South Wales the judicial system also perceived the peoples of Australia through the lens of conjectural history, depicting them as wild savages. The Supreme Court of New South Wales described them as ‘harmless inoffensive savages’ who wandered ‘about the country’ and lived in the ‘uncontrolled freedom of nature’.²⁸⁶ Australians’ savage state was contrasted to the civilized state of the British.²⁸⁷

The repertoire of conjectural history also inspired the British metropolitan elites who held influence over colonial affairs. This was the case of John Russell, Secretary of State for War and Colonies between 1839 and 1841, who had become familiar with conjectural history at the time of his studies with Dugald Stewart in Scotland from 1809 to 1812.²⁸⁸ Henry Temple, 3rd Viscount Palmerston who served terms both as Foreign Secretary and Prime Minister, had also been a pupil of Stewart.²⁸⁹ William Lamb, second Viscount of Melbourne who served twice as Prime Minister, had learned stadial theory from John Millar at Glasgow from 1799 to 1801.²⁹⁰ Viscount Howick, who was first Under-Secretary of State for War and Colonies for four years and then occupied the highest cabinet position in the same Department from 1846 to 1854, shared the same philosophy of history.²⁹¹ As Hickford has eloquently noted: ‘Whiggish attachment to stadialism proved particularly resonant in the way it appraised indigenous populations and their normative relations with landscapes or natural resources, such as land.’²⁹²

In the early nineteenth century, stadial theory remained a robust conceptual framework for understanding non-European backward populations.²⁹³ Ideas formulated by European intellectuals thus

²⁸⁴ Ibid., 368-369, 372.
²⁸⁵ Ibid., 371, 467.
²⁸⁶ R. v. Ballard or Barret, Decisions of the Supreme Court of New South Wales, 1788-1899, 100, 106.
²⁸⁷ Ibid., 102.
²⁸⁸ Hickford, Lords of the Land, 40.
²⁹⁰ Hickford, Lords of the Land, 41.
²⁹² Hickford, Lords of the Land, 41.
travelled to the colonies while ethnographic data on Australian peoples collected by travelers and explorers made the return voyage, buttressing preconceived theories about non-Europeans. Abstract ideas and colonial stereotypes reinforced one another, creating an ideological chain between metropolis and colony that was particularly difficult to break. After all, British explorers could only understand reality through the conceptual lens with which they looked at it. Besides, stadial theory suited British interests in exploiting Australian natural resources as it legitimated the displacement of the peoples who had enjoyed them before European colonialism.

The alleged backward condition of Australian peoples influenced how colonists understood their relationship to their land. According to conjectural theory, private ownership of land appeared only in an advanced state of society: the agricultural stage. Australians, who roamed over their territories, had not yet reached such a level of material progress. Accordingly, they had no notion of proprietorship and their lands were therefore supposed to be unoccupied and underutilized. Australian ecosystems awaited the arrival of the civilized hand that could improve them. The external and internal wilderness fused in the category of savagery. Civilizing the wild uncivilized mind and habits of the savage and improving the wild territory she/he inhabited became two threads of a common imperial cord.

In New Holland, the British had found territories that they perceived as pristine, unutilized, open, and unfenced. And even though throughout the period of settlement several books, newspaper articles, and individuals maintained that the peoples of Australia were proprietors of their territories, the majority of the settlers supported the contrary view, also held by the British State, that the Australians were savages, incapable of improvement. Due to the deficient nature of Australians, the newcomers had a right to improve the wasted continent as part of the British general imperial mission to control, govern, and civilize the world.

The British were well provided with a legal vocabulary within which they could translate their superior mastery over nature as an entitlement to appropriate the land and natural resources and to exclusively enjoy the fruits of their exploitation. According to the Roman law *ferae bestiae* things that lay unoccupied could be made the property of the first who seized them. That law was limited to immovable things, but European natural lawyers such as Grotius had expanded the scope of the right so as to include also immovable goods such as land. Through the works of natural lawyers, the law *ferae bestiae* became part of the law of nations. Eventually, the law *ferae bestiae* expanded into what has been called the

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agricultural argument. The latter doctrine expanded the scope of occupation, defining unoccupied land as that which was not cultivated. Other uses of the land, like hunting or gathering, did not count as occupation.

Locke developed this argument, mixing labor, improvement, and land in order to create a legal justification for the British acquisition of land in the North America colonies. Lockean principles and the ideas they validated were in vogue when the British extended their Empire to Australasia, and did not completely lose their persuasiveness in the following century.295 In 1833, George Poulett Scrope, a British Parliamentarian, wrote in his book *Principles of Political Economy* that ‘every fraction of the human family’ had from ancient times accepted the idea that ‘what a man obtains from nature by his own exertions becomes his property’.296 The French jurist Ortolan had also adopted a Lockean framework in his treatise on the modes of acquiring international dominium.297

Apart from Locke’s ideas, Joseph Chitty the elder’s English translation of Vattel’s treatise *The Law of Nations* was often quoted in Australian settlements.298 Most of the international legal commentators of the first half of the nineteenth century also echoed Vattel’s ideas about savages and occupation. Translating stadial thinking into the law of nations, Vattel had claimed that both *dominium rerum* (private property) and *dominium jurisdictionis* (sovereignty) emerged when the first human communities of wandering tribes appropriated land, tilling the soil and creating a political community.299 But in the case of communities that had remained in the savage state without cultivating the land, their territories were open to the appropriation of more industrious nations.300

The combination of Lockean improvement and sovereignty became a tool for Empire. Public law gave state support to the property interests guaranteed by private law. Sovereignty in Australia gave the British the possibility of defining and enforcing property rights as well as issuing decrees, ordinances, and statutes that prevented Australians from using their territories and the natural resources they contained as they had traditionally done.301

297 See supra Chapter 6, pages 310-311.
300 Ibid., 100-101.
301 Weaver, *The Great Land Rush*, 139.
Since the beginning of settlement, under the conviction that the territory of Australia was owned by the Crown, colonists acquired land through Crown land grants. During the first decades of settlement the sovereign power of the Crown to grant land rested on the Governor.\textsuperscript{302} The first land grant was given by Governor Phillips to James Ruse, an emancipated convict, in 1792.\textsuperscript{303} Initially, grants were limited to 100 acres and were conditional on having enough capital to invest in the land.\textsuperscript{304} But individuals were not the only beneficiaries of land grants. For example, in 1824 the British Parliament passed an Act creating the Australian Agricultural company, allocating 1 million acres of land for the cultivation and improvement of Australian waste lands.\textsuperscript{305}

The limits of the initial individual land grants were almost always surpassed by sheep owners. They encroached on Crown land, generally known as waste lands.\textsuperscript{306} The widespread repetition of this act, known as squatting, gave rise to a powerful proprietor class of squatters. In 1831, under the influence of Wakefield, the Ripon Regulations issued by the Colonial Office established that all Crown lands were to be sold by public auction.\textsuperscript{307} These regulations, followed by the Burke’s Act of 1836 and the Imperial Acts of Parliament of 1842 and 1846 regulating ‘the Sale of waste land’, tried—to no avail—to restrain the occupation of Crown land and prevent the extension of the pastoralist economy.\textsuperscript{308} Their goal was to encourage the development of agricultural communities around settlements.\textsuperscript{309}

None of these pieces of legislation dealt directly with the legality of the acquisition of Australia in the first place. However, other official documents and legislation of the era referred to the British acquisition of territory. In 1819, a dispute occurred between Governor Lachlan Macquarie and Barron Field, Judge of the Supreme Court of New South Wales, about the power of the Governor to tax settlers. The English

\textsuperscript{302} George Handley Knibbs, \textit{Official Yearbook of the Commonwealth of Australia} (Melbourne, McCarron, Bird and Co. Printers, 1915) Section VI §1 129.


\textsuperscript{304} Ibid.

\textsuperscript{305} \textit{The Statutes of the United Kingdom of Great Britain and Ireland}, with notes and references by John Raithby, of Lincoln’s Inn, Esq. Vol IX (21 June 1824), 5\textsuperscript{th} Georg IV c.86, ‘An act for granting certain powers and authorities to a company to be incorporated by Charter, to be called ”The Australian Agricultural Company”, for the cultivation and improvement of waste lands in the colony of New South Wales, and for other purposes relating thereto’, Cap. LXXXVI, 799-809.


\textsuperscript{308} 5\textsuperscript{th} & 6\textsuperscript{th} Victoria, c. 36 (1842), \textit{An Act for Regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies}, CAP XXVI, 310-314.

\textsuperscript{309} Ibid., 99. See also Knibbs, \textit{Official Yearbook}, Section VI §1 220.
Attorney General Samuel Shepherd and the Solicitor General Robert Gifford resolved the question in Field’s favor. They explained that the Crown and its representatives had the power to tax colonies that had been acquired through conquest. But that was not the case of New South Wales. The part of New South Wales that the Crown possessed, they affirmed, was not acquired by conquest, but taken possession of ‘as desert and uninhabited’ lands.

A similar legal opinion was given in 1822 by James Stephen, a mere law clerk at the time who later became Undersecretary for the Colonies. Again, as in 1819, the issue under consideration did not involve Australians or the issue of property over the land. The question under contention was the competence of the Governor to issue laws by proclamation. Stephen, following the logic of Shepherd and Gifford regarding taxes, maintained that the direct legislative power of the Crown and its representatives was limited to colonies acquired by conquest or cession. In other types of colonies the King needed the consent of the Parliament to make laws. Paraphrasing his colleagues, Stephen affirmed that New South Wales had not been acquired by conquest or cession but by the occupation of a ‘desert or uninhabited land’. Under those circumstances, if His Majesty decided to grant legislative power to the Governor, that power ought to be validated by a local Assembly.

The vacant character of Australia according to British legal opinions was further confirmed by the British Parliament. The South Australian Colonization Act of Parliament of 1834 declared that the South Australian territory prior to colonization consisted of ‘waste and unoccupied lands’. This opinion was echoed in 1834 by Chief Justice Francis Forbes of the Supreme Court of New South Wales, who repeated the distinction made by British lawyers between colonies acquired by conquest and cession and those like New South Wales which had been settled as ‘uninhabited country’. Consequently, the King was entitled to ‘all the waste lands of the colony’.

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311 Ibid.
313 Historical Records of Australia, Series IV, Legal Papers, Section A, Volume I, 414.
314 Ibid.
315 Ibid.
316 Ibid.
319 Ibid.
But, as noted earlier, not everybody in the new colony believed that Australians were not the owners of their territories. Some individuals even acted on this belief. This was the case of John Batman, who in 1835 signed a treaty with the Kulin people of the south-west coast of Australia, hoping to acquire fertile land for pasture.320 This was the only attempt in Australia of ever negotiating the cession of land with Australian peoples. The reason why that practice was discontinued was simple. On 26 August 1835 the Governor of New South Wales Richard Bourke made clear that the acquisition of land from the ‘Aboriginal Natives’ had no legal validity.321 Bourke’s Proclamation deterred other colonists from dealing directly with Australians. The Crown, not Australian peoples, was the owner of Australia. Lieutenant Colonel George Arthur concurred with Bourke’s opinion that ‘a migratory savage tribe … roaming over an almost unlimited extent of country’ could not be the owners of the land.322

Savages and the New South Wales Supreme Court

Despite all these statements and the conceptual and legal apparatus that the British deployed in order to fashion their relationship with the peoples of Australia, the latter were not under the legal authority of the former for the first fifty years of settlement. There was a significant gap between British expectations of governing and owning Australia from the outset and events on the ground. In time, expectations and reality converged. However, for a long time legal pluralism was the norm in Australian colonies. The courts of New South Wales generally acknowledged the jurisdiction of the peoples of Australia over their own affairs.323 This recognition did not translate into an automatic benevolent attitude toward Australians, and there was no lack of violence. But Australians still maintained their own jurisdiction both within and outside the colony.

The situation changed from 1824 to 1835 in a period of fast economic and geographical expansion of the colony of New South Wales. As wool from Australia fed the growing and lucrative textile industry

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320 For the history and context of the treaty see James Boyce, 1835: The Foundation of Melbourne and the Conquest of Australia (Collingwood, Black Inc., 2011) 57-73.
322 James Bonwick, Port Phillip Settlement (London, Sampson Low, Marston, Searle, & Rivington, 1883) 220.
at home, and dreams of acquiring the resources of a whole continent seemed within reach, the British started to shift toward an inclination for exercising jurisdiction over the people of Australia.324

The real blow to Australians’ jurisdiction and territorial claims in the new colonial scenario came in 1835 in the trial of Jack Kongo Murrell and George Bumaree, who had killed two of their fellow compatriots.325 This was one of the first times that the Supreme Court of New South Wales agreed to adjudicate a case involving only Australian peoples. The case became the landmark of the extent of British sovereignty and property in New South Wales.

In defense of Jack Murrell, his counsel John Stephen argued that British law did not apply to the case, because the peoples of Australia had their own societies, customs, and regulations to solve the matter.326 In other words, they had their own jurisdiction. This line of argumentation was in consonance with the general practice of the courts of New South Wales up to that time.327

The views of the Supreme Court changed with the arrival of William Westbrooke Burton (1794-1888), who firmly believed that the rights of non-European populations within the Empire were better protected under British jurisdiction.328 Chief Justice Francis Forbes believed that the definition of the legal status of Australian peoples as well as the extent of British sovereignty were questions to be decided by the legislative and not the judicial branch of the colonial state.329 However, Burton’s views found their way into the Court, setting a precedent from which to resolve the thorny question of the legal status of the peoples of Australia vis-à-vis imperial power.330

The legal case was actually resolved in favor of Murrell and Bumaree, whom the jury acquitted based on the ground that they were too ignorant and savage to understand the legal system under which they were being judged.331 Nevertheless, it was Burton’s legal opinion and not the jury’s decision which set a legal precedent regarding the status of Australians’ sovereignty, property, and jurisdiction within the colonial legal system.

In his judgment Burton made first an evaluation of the degree of complexity of the communities that the British ‘found’ in Australia. Despite considering that the freedom and independence of the peoples of Australia ought to be safeguarded by the British, they had not yet, at the time of settlement, reached a

324 Ibid., 158-182.
325 For a detailed analysis of the case see Ford, Settler Sovereignty, 196-203.
326 Ibid., 196.
327 Ibid., 197.
328 Ibid., 203.
329 Ibid., 197-198.
330 Ibid., 197-198.
331 Ibid., 198.
332 Ibid., 199.
position in ‘point of numbers and civilization’ as well as ‘Government and laws’ so as to be recognized in parity with more civilized states. And hence, ‘the king of England’ took possession of ‘a tract of country before unappropriated by anyone’. He further declared that the English nation had acquired the rights of *dominium* and *imperium* over Australia, thus extending British jurisdiction over its new colony.

Burton employed stadial language in service of the British Empire. The degree of social advancement and civilization of the people of Australia was so low that it prevented the recognition of its political and legal existence. Savages had no civilized institutions, lacking both government and laws. Moreover, they had no notion of private property and, henceforth, they could not have been in possession of Australia before English arrival. Australia was vacant and open for appropriation through occupation. In his reasoning, Burton mixed stadial theory with the law of nations, citing Vattel as the legal source from which to base his statements. From Burton’s perspective British colonization was not only legitimate, but also a service to humanity as civilization was extended over wilderness.

Burton agreed with Vattel’s view that the Earth belonged to humanity in general and that its cultivation was an obligation imposed upon humans. He also paraphrased his opinion that if indolent savages did not cultivate their territories industrious nations in need of land could occupy them. The British acquired dominion and empire by cultivating the wilderness. Decades before Burton’s findings, Chief Justice Forbes had already observed that Australia was ‘generally speaking … a wilderness’. Colonization was necessary for the improvement of ‘desert wastes’.

Burton was not the first to declare Australian land vacant. Piles of official documents before him had declared Australia a desert, uninhabited and unoccupied space open for first taking. But Burton’s conclusion carried the authority of the Supreme Court of New South Wales. This decision had special

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333 Ibid.
334 Ibid., 212.
335 Ibid., 214.
337 Ibid., 249.
338 Ibid.
340 Ibid.
legal weight and therefore decisively eroded Australians’ political independence and their use of Australia’s ecosystems. Paradoxically, it was the very placement of the peoples of Australia under the protection of British law that left them unprotected against foreign encroachment of their territories. While the legal light of civilization opened Australia’s natural resources to the industriousness of those who profited from their exploitation, it darkened the prospects of those whose close—albeit far from always harmonious—bond with nature was deemed an obsolete and backward anomaly to be overcome.

Years after R. v. Murrell and Bummaree, in the case of Attorney-General v. Brown in 1847, Chief Justice Stephen restated that all of Australia’s land belonged to the British Crown since the beginning of the settlement. This statement was based on the translation of English feudal law to Australia. According to English feudal law, all land belonged to the Crown.341 The Crown was the pinnacle of a feudal tenure system inherited by the British Empire.

In Attorney-General v. Brown the Crown brought a case against James Brown, a settler who was accused of intrusion on Crown lands.342 Brown had leased the land from Arthur Dumaresq who, in turn, had a right derived from a land grant.343 Coal had been found in the land and Brown was resolved to exploit it.344 The Crown argued that the establishment of a coal mine violated the terms of the original grant.345 The case was decided against Brown, who appealed to the Supreme Court of New South Wales.

In the Supreme Court, Richard Windeyer, Brown’s legal counsel, did not doubt that the land in contention belonged to the Crown. But he argued that the power of the Crown to impose limitations on the free use of the land had been restricted by English legislation.346 The Crown was the main divider of the land, but could not reserve any other power over it.347 The three judges deciding the case disagreed. Chief Justice Stephen maintained that Australia had been discovered and settled by the British.348 This meant that, upon discovery, all the land and natural resources belonged immediately to the Crown.349 The exploitation of those resources could only be done through a legal title emanating from the Crown.

After the decisions R. v. Murrell and Bummaree and Attorney-General v. Brown, Australian land continued to be given to colonists. In the 1860s legislation regulating land was introduced in Vitoria,

343 Ibid., 2-3.
344 Ibid.
345 Ibid., 2.
346 Ibid., 8-10.
347 Ibid., 9.
348 Ibid., 10.
349 Ibid., 10.
New South Wales, South Australia, and Queensland. These pieces of legislation consisted of the Crown Land Alienation Act of 1860 in Queensland, the Nicholson Land Act of 1860 in Victoria, the Crown Lands Act of 1861 in New South Wales (also known as the Robertson Land Acts), and the Strangways Land Act of 1869 in South Australia. All these laws regulated how the land was sold in each of the Australian states. They responded to the economic boom of Australia and the capitalist redefinition of property as a tradable commodity that took place during the second part of the nineteenth century within the British Empire.

The fiction that Australia was vacant, unoccupied, and unexploited was maintained by the Australian courts throughout the nineteenth and twentieth centuries. Almost a century and a half after R. v. Murrell and Bummaree, the Supreme Court of the Northern Territory made the same claim in the case of Milirrpuu v. Nabalco Pty Ltd. This was the first time that Australian peoples (in this case the Yolngu people) went to court with the purpose of defending their land rights, this time against Nabalco, a mining corporation. In his decision Judge Blackburn, as British jurists had done before, distinguished between settled colonies in which the land was ‘desert and uncultivated’ and colonies acquired through conquest or cession. He concluded that the former, populated ‘by uncivilized inhabitants in a primitive state of society’, were acquired through occupation.

Only in 1992 was the legal fiction that the British had occupied Australia, acquiring dominion over all of it, dispelled in Mabo v. Queensland. British sovereignty, the High Court of Australia argued, did not extinguish ‘native title’ over Australia. This was a welcome change of doctrine. But after two centuries of British settlement, violence, and the continued encroachment on and exploitation of the ecosystems from which Australians nurtured, there was little, in practice, to celebrate. Both the pre-colonial population of Australia and its natural habitats had suffered immensely from the price of philosophical ideas, legal doctrines, and economic interests and practices aimed at improving and civilizing both wild people and wild nature.


353 Milirrpuu v Nabalco Pty Ltd (1971) 17 FLR 141.

354 Ibid., 201.

355 Ibid.

Concluding remarks

In 1850 the world was more privatized than ever before. In little more than 50 years, and under the ‘settler revolution’, millions of hectares had fallen prey to an economic-legal rationale of private appropriation. As Warren reminds us, private rights are an ‘expression of how natural goods can be conceptually separated from the earth and tied to people’. In some sense, this process is always an illusion (the illusion that the Earth belongs to humans). But the delusion of owning nature is a powerful one, and during the first part of the nineteenth century industrialization pushed humans to acquire natural products that were demanded by expanding and predominantly urban global markets.

The prospect of converting the untapped natural resources of supposed vacant areas of the biosphere into wealth and progress stimulated Western expansion and global capitalism. European colonialism placed millions of hectares in the hands of private owners. An innumerable amount of natural products were similarly privatized. Myriad parts of ecosystems were transformed into commodities that traveled far and fast around the world. In places like Beijing, Sydney, London, New York, Chicago, Manchester, Paris, Vienna, a privileged few and an underprivileged many required growing amounts of selective luxuries for enjoyment and an array of indispensable goods to subsist. But before Anglo-Saxon colonists founded Neo-Europes in North America, the Pacific, and South Africa, those territories were inhabited by numerous non-European polities. If the cosmopolitan need for separating even more natural products from the Earth and allocating them to proprietors, merchants, and avid markets was to be fulfilled, there was an imperative urge to legalize this gigantic land grab.

During the nineteenth century European and American thinkers, international lawyers, policy makers, explorers, and judges used stadial theory—or at least its category of savagery—to make sense of and interpret the world outside Europe. Through the prism of this particular interpretation of human social development they assumed that extensive areas of the Earth were inhabited by the most backward category of humans to be found in the globe: savages. Eventually, this category became naturalized, and legal commentators used it independent of the theoretical framework in which it had traditionally operated. Even when stadial theory was not directly used, speculation about savages was common.

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357 See introduction, pages 3-4.
358 Ibid.
One point of general intellectual agreement around the condition of savagery was that the crude character of savages predetermined the state of the land in which they lived. Savages were assumed to exist in the wilderness. They were referred to as ‘the children of wilderness’359 or as savages living in the ‘uncontrolled freedom of nature’360. Therefore, settler colonialism encompassed the double mission of redeeming backward populations and transforming unutilized lands and natural resources into fertile engines of economic progress.

This does not mean that the white man’s burden of spreading civilization and improving the Earth was accepted and preached uncritically. Marshall was perhaps the most reputed legal figure who attempted to safeguard a legal sphere of protection within which savage societies could survive. But even his bold attempt to limit state power and circumscribe federal rule over North Americans had its own conundrum. His judgment was adopted in the court of the victor and under its rules. The federal government had a right to extinguish native title, but only if North American consented. But Marshall made reference to a number of treaties between the U.S. and North American peoples without paying enough attention to the fact that in the colonial context being part of a legal agreement was not always synonymous with exercising free will. North Americans could negotiate and had a certain space for maneuvering, but as the settler frontier advanced that space was swiftly reduced.

The dream of a sphere of independence—if vague and small—derived from Marshall’s pronouncement soon vanished in the air. Andrew Jackson flexed the muscles of the executive to shutter any dreams of emancipation and autonomy. North American nations were forced to migrate west and to settle in alien territories in which they were further and further weakened, constrained, and disenfranchised. As long as they did not have the military power to confront the advance of settlers and the Union, their presence on the land did not count in a legal sense. This fact was evident in the legal dispute over the Oregon territory, a debate in which their presence was conspicuously ignored.

In the Supreme Court of New South Wales things were even more somber for Australian peoples. Vattel was widely cited in order to justify the legal displacement of their retrograde productive activities (and those who carried them out) and their substitution by more efficient economic practices (and those who incarnated them). Stadial theory and the agricultural argument were applied in Australia in disregard of the pre-colonial population and their uses of nature.

359 See supra footnote 128.
360 See supra footnote 287.
Freed from the troublesome legal presence of the leftovers of backward humanity, settler colonialism proceeded unabated. Most of the Earth had finally been opened for occupation by the industrious and progressive nations. The destiny of non-Europeans who died and suffered as a consequence of this process was also the fate of non-European nature. As ‘savages’ perished and shrunk, so did their habitats, the biodiversity of ecosystems, and non-European’ ideas of how humans ought to relate to non-human nature. Under a more exploitative approach to the use of ecosystems in the U.S. and Australia, animals disappeared forever or died by the millions, countless forests were reduced to a fraction of their previous size or completely cut down, soils were eroded and degraded as commercial agriculture insatiably fed from their fertility, the air around cities and mines became plagued with smoke and chemical pollutants, and the overuse of water and its pollution destroyed countless riverine ecosystems and aquifers.

As extensive as this was, the destruction of humans and nature that resulted from settler colonialism was only part of a larger picture. During the second half of the nineteenth century, as industrialization accelerated and the demand of markets boomed, the imperial penetration of the world reached its apex. Western science and technology showed for the first time its capacity to unveil all of nature’s secrets. Imperial powers pressed hard to obtain even more territory in continents not yet under the rule of Western powers. Colonial powers sought to govern nature and squeeze the natural wealth that it contained for national aggrandizement and individual wealth. Under a new wave of imperialism, Westerners pressed hard to open the world’s unexploited natural frontiers to the hectic activity of the—predominantly Western—*homo economicus*.
In 1851 the Crystal Palace housed an extraordinary event. For a few months, the world’s technical wonders and scientific achievements were on display in London. Built for the occasion in just nine months, and visited by six million people during the course of the Exhibition, the Crystal Palace was the incarnation of the very creative powers and prowess of industrialization. The Great Exhibition did not only reveal to the world the latest inventions and productive systems, it also celebrated and encouraged a particular economic understanding of what was the best present and the desirable future of humankind.

If industrial capitalism was to be celebrated at the Great Exhibition, no other nation was in a better position to host the event than Great Britain. After all, it was the nation that had first adopted it and, in so doing, had almost singlehandedly changed the economic and social course of humanity, inspiring other Western nations to follow its progressive path. In this sense, the official catalogue of the conference noted that worldwide respect for British economic policies and institutions as well as its technological capacity, namely ‘the perfect security for property; the commercial freedom and the facility of transport’, were the chief reasons to locate the Exhibition at the heart of the British metropolis.¹

The British epitomized the power of industrialization and a liberalized market economy. But the Exhibition was also a demonstration of a wider power: that of modern man over nature. The latest technological advances were testimony to the growing dominion of humans over nature, a power that constituted the springboard for economic progress.² Prince Albert, who had taken the lead in the organization of the Exhibition, eloquently captured this sentiment in a speech given to the municipal authorities of Great Britain. At the occasion of a banquet celebrated to publicize and advertise the Exhibition he declared:

² Paul Yong, Globalization and the Great Exhibition: The Victorian New World Order (Basingstoke, Palgrave Macmillan, 2009) 5.
So man is approaching a more complete fulfillment of that great and sacred mission which he has to perform in this world. His reason being created after the image of God, he has to use it to discover the laws by which the Almighty governs his creation, and, by making this laws his standard of action to conquer Nature to his use—himself a divine instrument … The Exhibition of 1851 is to give us a true test and a living picture of the point of development at which the whole of mankind has arrived in this great task, and a new starting point from which all nations will be able to direct their further exertions.³

Through technological innovation, Prince Albert observed, the world was now a manageable entity that was progressively moving toward homogenization.⁴ People, ideas, and goods travelled at an unprecedented speed. The old progressive and cosmopolitan yearning to conquer nature and govern the Earth was, for the first time in history, within human reach.

But despite significant steps forward in the path to progress, there was still a long way to go. The human to which Albert referred was none other than the modern individual, still a rare creature in a world of heterogeneous peoples. And, outside a handful of Western nations, the British believed that most humans still lived in pre-historic conditions. Non-European territories housed myriad retrograde societies surrounded by wilderness. In this respect, as Albert noticed, the Exhibition was also a point of departure. It represented a renewed call for the progressive transformation of the unused or underutilized natural resources of the world.⁵ The cosmopolitan mandate to control and transform nature in a planetary scale provided British imperialism with a robust legitimating rationale, one that presented the British Empire as the transformative force of modernity.

Importantly for Great Britain, the mission of feeding industrial capitalism with raw materials was also extremely profitable. As Albert recognized, ‘the products of all quarters of the globe are placed at our disposal, and we have only to choose which is the best and cheapest for our purposes, and the powers of production are intrusted to the stimulus of competition and capital’.⁶

By the mid-nineteenth century, the idea of governing, transforming, and exploiting nature had not lost any of its appeal. But the change of colonial scenario from North America and Australia to Africa and Asia represented a challenge to the way colonialism was justified in settler societies. At the time of the Berlin Conference (1884-1885), the days of savages were forever gone. Yet, paradoxically, as savages

³ Official Descriptive and Illustrated Catalogue, 4.
⁴ Ibid., 3.
⁵ Yong, Globalization and the Great Exhibition, 10.
⁶ Official Descriptive and Illustrated Catalogue, 4.
receded from central stage in international legal debates about occupation, they were at the forefront of theoretical debates about evolution, featuring especially prominently in the work of socio-cultural anthropologists. In 1871, for example, Darwin reflected about savages in the book in which he attempted to translate his findings on natural evolution to the human sphere, *The Descent of Man.* In one of the books that most importantly contributed to adumbrating a novel understanding of human life on Earth, one could still find a reformulation of ideas that had been put forward centuries before by international legal commentators. Darwin affirmed that:

> When we see in many parts of the world enormous areas of the most fertile land peopled by a few wandering savages, but which are capable of supporting numerous happy homes, it might be argued that the struggle for existence had not been sufficiently severe to force man upwards to his highest standard.

Darwin placed savages in an evolutionary mold that mixed the old idea of savagery and occupation with the novel and modern idea of evolution. Even more than Darwin, sociocultural anthropologists such as Lubbock, Tylor, and McLennan put the savage at the center of their scientific investigations. Contemporary savages were the living vestiges of primitiveness. Thus, their study was vital to elucidating how primitive societies had transmuted so as to reach the sophistication characteristic of modern societies. Against creationists who opposed evolution and degenerationists who believed that savages degenerated from a superior human specimen, sociocultural evolutionists defended the incremental development of societies from a primitive to a modern condition.

Something common to all theories of social evolution was the idea that humans were more enmeshed in nature than Western intellectuals had previously been willing to acknowledge. The traditional conviction about the radical difference and superiority between human and non-human nature—be it because of human reason, soul, or resemblance with God—had to be discarded. The difference between human and non-human nature was not one of kind but rather degree. Evolution had demonstrated that one of the most ingrained truths in the Western intellectual imagination was nothing more than a belief. Evolution faced an enormous resistance as it turned the intellectual world of nineteenth-century Britain upside down. It was humbling to wake up and discover that humans were only evolved apes after all.

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8 Ibid., Ch V 180
10 Ibid.
But it was precisely humanity’s natural origin the put the struggle for existence, the slow creation of a civilizational niche out of wilderness, at the center of theories of evolutionary progress.11 Humans, who had started evolving from a continuum with nature, had slowly ascended over it. Therefore, the degree of human control over non-human nature marked the success of their evolution.

Marxism, one of the most influential end-of-the-century ideologies, also emphasized the importance of material factors of production (the ways in which humans modified nature to satisfy their needs) and struggle—class struggle in this case—as motors of world history. At the other end of the spectrum, liberalists could point to the supremacy that capitalist industrialism had given humans over nature as the definite proof of human progress. As Prince Albert had explained, the movement from primitiveness to modernity run parallel to the process of conquering nature. Humans had evolved from being subjected to the laws of nature to being able to control and bend those laws to their advantage.

But not all humans had managed to control nature and ascend over it. Primitive societies had remained trapped in the natural realm, fused with their surroundings. Therefore, the social and natural spheres had not yet been disentangled in non-European territories. Because non-European peoples lived in a continuum with nature there was no civilizational niche that could serve as the definite home to an evolved humanity. This was then the task of the civilizing mission. In Africa and Asia, nature had still to be exploited before civilization could advance. This state of affairs made evident the urgency of Western imperialism as an agent of progress.

The theoretical purpose of sociocultural anthropologists was to defend the possibility of progress. As with many Victorians, they believed that the Industrial Revolution had transformed humanity’s relation to nature by giving the former the possibility of governing the latter.12 That was a fundamental element in the path toward progress. It was also a belief shared by the discipline of international law. International lawyers celebrated without reservation the progress that Western nations had achieved.

The international legal profession was an enthusiastic adherent to Western civilization. International lawyers firmly believed that their discipline was one of the most progressive forces of modernity. For that reason, they too celebrated the Great Exhibition as the materialization of cosmopolitan aspirations

11 Ibid., 170.
12 Stocking, *Victorian Anthropology*, 220.
to international peace\textsuperscript{13} and prosperity.\textsuperscript{14} In their opinion, international law could provide universal standards of good governance applicable worldwide. It could also help in spreading institutional mechanisms to guide the natural evolution of humanity. In so doing, the novel profession could carry the torch of progress, fulfilling its role as the guardian of civilization. Finally, it could continue providing guidelines to reform and govern non-European territories and ecosystems. But how exactly could that mission be carried out in practice?

Fifteen years after the publication of the \textit{Descent of Man}, from the Berlin Conference onwards, as the terminology of savagery began to disappear from legal texts, there was a compelling need to explain why the densely populated territories of Africa and Asia should be placed under European rule. While in Africa and Asia the standard of environmental exploitation was, in general, no longer applicable, the urge to exploit untapped natural resources was stronger than ever before. Africans and Asians were no savages, and their territories could therefore not be easily occupied. But as the global economy expanded, profitable raw materials, especially from the tropics, incarnated the promise of constant production and unfettered consumption. The profession of international law responded to that challenge in a variety of ways. Chapters 8 and 9 will explore the novel legal theories that international lawyers developed in their attempt to respond to the theoretical demands of a new historical context in which non-European ecosystems became, perhaps more than ever before, tied and subservient to the modern exigencies of progress.


\textsuperscript{14} Leone Levi believed that the bright future that the Exhibition promised was yet to be realized. It was precisely the role of the law of nations to tame the darker features of the international arena and guide mankind toward peace and prosperity. See Levi, \textit{The Law of Nature}, Ch 1 18-20.
Countries which are not in the legal possession of any civilized state, but which are inhabited by savage tribes may be acquired by occupation; limiting it however, to the portions of territory unused by the natives and in which, by reason of the disproportion between the area and their needs, they cannot apply the ordinary means of exploitation to render them productive.¹

The first land rush of the nineteenth century had paid great dividends to the British Empire and the U.S. By the last decades of the nineteenth century, both empires had occupied Oceania and the region of North America situated between what is today Mexico and Canada. As far as savages were concerned, the general view among the jurists of the second half of the nineteenth century was even more protective of their territorial entitlements than those of the first half. Most international jurists of the first half of the century had legitimized the taking of savages’ territories while emphasizing the need of reserving some land to assure savages’ subsistence. Additionally, many advocated the good treatment of non-European populations.

International lawyers of the second half of the century were also in favor of the humane treatment of savages. But, in contrast with their predecessors, they generally agreed that North American savages were in possession of certain territories from where they could not be expelled. Western powers could extend their sovereignty over those territories, but in case they wanted to occupy the lands used by savages, they had to obtain their consent and offer some kind of economic compensation in return for the land. The case of Australia was different. Most commentators made a differentiation between North American and Australian savages. The latter had neither agriculture, nor civilization, and hence no notion of private

¹ Pasquale Fiore, International Law Codified and its Legal Sanctions or The Legal Organization of the Society of States (New York, Baker, Voorhis and Company, 1918) Book III Title III §1061 423.
property. Having a legal carte blanche to occupy Australian territory, the British displaced Australians from the lands they had inhabited for millennia.

But even the most humanitarian international legal commentators—those sensitive to the fate of savages, recognizing certain entitlements that those communities had vis-á-vis colonial powers—believed that even if savages could not be expelled from their lands (those that they were using), there were still immense tracts of wild vacant land in North America and Australia open for acquisition. Humanitarianism toward the vanishing savage was easily reconcilable with colonialism, particularly at a historical time in which savage populations were rapidly shrinking and most of the continents in which they lived had been entirely occupied. Therefore, the recognizing of savages’ right to occupy their territories had little practical implication.

Wilderness was the dividing line between civilization and savagery. Its pervasiveness in non-European territories called for the reforming and improving hand of Western progressive nations. Significantly, as savages perished, the extension of the uncivilized natural frontier steadily grew. The havoc that U.S. and British imperialism caused among North American and Australian peoples greatly reduced their numbers and the space they occupied. In North America and Australia, they were confined to a minimal fraction of the continental mass. Conversely, under less human pressure, non-European ecosystems blossomed. So whole continents, excluding the fraction where savages lived, were legally opened to legitimate occupation. In this sense, defending the right of savages to occupy territory did not pose a challenge to European colonization.

The conceptual framework that had been applied to savages in North America and Australia for over a century entered crisis toward the end of the century. In Africa, it was no longer applicable. Despite the loss of millions of lives, Africans did not suffer the population collapse that non-European peoples experienced in America and Oceania. To a certain extent the trend actually reversed. Most Westerners who ventured into the interior of Africa perished as a result. Settler colonialism was not an option, at least not in most of the continent. So, as Western nations started to penetrate Africa, they needed to find new legal tools with which to justify their actions. African populations could not just be dismissed. Accordingly, the doctrine of occupation shifted to accommodate the change of colonial scenario.

International commentators recognized that ‘African tribes’ were socially more evolved than ‘savage communities’. African human communities were in general agricultural and had a certain kind of political organization. Unluckily for Africans, at the end of the nineteenth century those traits were not per se enough to deserve political recognition and legal status as international actors. The consolidation of states
as sole agents of the law in the international plane meant that African political communities which failed to organize as nations did not meet the new standard of progress.

Africans may have been more civilized than Australians or North Americans, but the threshold of civility was now raised to new heights. In addition, industrialization made Africans’ productive systems look rather primitive in comparison with the more evolved Western systems. At the very least, Africans seemed to be unable to undertake the cosmopolitan exploitation of vacant resources, a trait that was interpreted as a lack of progressive civilization. Being outside the pale of civilization and having no international legal agency meant that Africans could not have a say on the standards that were now used to measure their civilizational status. Once they were judged to be wanting in civilization, colonial powers could occupy Africans’ sovereignty in order to guide them toward statehood and social progress.

In this chapter I will describe the changing nature of the doctrine of occupation. This change is important for our analysis, because the shifting of occupation from the acquisition of property to sovereignty challenged the way in which the exploitation of non-European nature had been legitimized in previous centuries.

*The receding savage: occupation before the Berlin Conference*

Since Columbus’ arrival to America, European commentators had tried to come to terms with the relationship that non-European populations had with their surrounding ecosystems and natural habitats. Based on their assessment of the extent to which those populations could make nature productive and utilize the natural resources at their disposal, they recognized that colonists had certain rights to use the environment and profit from its exploitation. This assessment changed according to place and time. In Latin America, Vitoria recognized a right to apprehend and use natural elements that were vacant—that is, unoccupied. In North America, Locke used the so-called agricultural argument to amplify the scope of this right. According to this doctrine, English colonists could appropriate land that was uncultivated or not properly cultivated according to European standards.

Those rights put in jeopardy the capacity of non-Europeans to keep territories that had sustained their lives and informed their worldviews for millennia. After a series of debates in the British colonies of North America during the seventeenth century, it was generally agreed that land had to be bought from the pre-colonial population who were considered as owners. Still, the agricultural argument applied to the vast spaces of the continent that the Europeans thought were not used and occupied by North
Americans. In Australia, stadial theory and the agricultural argument buttressed the legal myth that the whole continent was unoccupied, and hence the British Crown could claim its ownership. Based on this assumption, colonists obtained the land directly from the Crown.

During the first half of the nineteenth century, international legal commentators, judges, politicians, explorers, and intellectuals at large continued debating the question of whether backward populations of savages could keep territories which they supposedly could not make productive. European intellectuals believed that as industrial European nations rapidly advanced and expanded their economic activities, there was a compelling need to exploit all the underutilized ecosystems of the world to keep up the pace of human progress. Material improvement resulted in the betterment of all aspects of human life. So, the progress of humanity hinged on the capacity to continue and even accelerate the transformation of wild landscapes and idle natural resources into active engines of civilization. This cosmopolitan mission was also extremely lucrative for the privileged few who owned and traded the commodities (produced or extracted in various world’s natural frontiers) that became the lynchpin of dreams of unlimited wealth.

From the mid-nineteenth century European commentators and their American counterparts continued debating the legitimacy of the occupation of territories of backward non-European populations. As in the first half of the nineteenth century, there was a certain degree of variation within the general homogeneity with which jurists approached the matter. The theory of occupation was delineated differently by different scholars depending on their nationality, ideology, and political agenda. Of all factors, the ‘scramble for Africa’\(^2\) was without doubt the historical event that most significantly shaped the doctrine of occupation at the end of the century. Besides, international lawyers struggled to accommodate the immorality of Western imperialism and the subjugation of non-Europeans with the colonial fact. While they generally criticized the ill-treatment that non-Europeans had suffered during the colonial period preceding the nineteenth century, they also underscored the benefits that colonization brought to the colonized and the world at large.

There were two main positions among authors who debated the doctrine of occupation before the Berlin Conference. On the one hand, there were those who claimed that savages were owners of the land they used for their subsistence. These authors also criticized the ill treatment of non-European populations. On the other hand, some commentators claimed that the taking of savages’ territories was legal. At first sight, this seems to be a clear difference between both groups. However, on closer scrutiny

\(^2\) This term can be found in one the leading British international legal text of the period. See Thomas Joseph Lawrence, *The Principles of International Law* (Boston, D.C Heath & Co., Publishers, 1900) Part II Ch II §92 144.
there was not such a large gap. Those who were more protective of the rights of savages ultimately recognized some scope of application for the right to occupy. Conversely, it is also possible to observe a humanitarian tone in some of the international lawyers who justified European occupation. Both groups also remained utterly Eurocentric in that they took European superiority over savages for granted.

The group of lawyers who defended savages’ territorial entitlements (at least to a certain extent) was composed of British international lawyers such as Edward Shepherd Creasy (1812-1878), Professor of Jurisprudence at the Inns of the Court and emeritus Professor of History at University College London. His views on the matter evidence the combination between a moral and a legal assessment of occupation that characterized the legal texts of the time. Based on moral standards of conduct, he denounced the injustice of the European treatment of non-European populations. After having scrutinized the historical process of European territorial aggrandizement, he concluded that it gave little ‘credit’ to European ‘culture’. He was even critical of the British Empire. Australia and New Zealand were examples of the excesses that had also taken place in other parts of the Empire.

For Creasy, occupation applied *sensu stricto* to territories that were uninhabited or deserted. But the strict application of that rule would have prevented most European territorial acquisitions. Creasy explained that European colonial powers had overcome that obstacle by entirely disregarding the proprietary rights of non-Europeans. Using a lucid comparison with animals he illustrated how non-Europeans’ rights had been ignored. Non-Europeans had been made invisible and given as much importance as the natural habitats that surrounded them. As far as the ownership of their territories was concerned, they were treated like ‘herds of elks’ and ‘families of black beavers’. Creasy captured better than any other contemporary commentator the fact that non-Europeans had been placed in a continuum with nature. Civilizing humans and civilizing nature were part of the same imperial mission of socializing non-European spaces. In addition to this critique, Creasy even challenged the Eurocentrism that underpinned European expansion, affirming that the countries where ‘native tribes’ lived were ‘new to Europeans, but not new to human beings’.

Not endorsing the way in which European imperialism had generally proceeded did not amount to rejecting colonialism as such, however. In fact, Creasy directly participated in the administration of the

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5 Ibid., §216 207.  
6 Ibid., 208.  
7 Ibid., §217 210.  
8 Ibid., §216 208.
British Empire. He was Chief Justice of Ceylon, and in 1872 he published a book on the *Imperial and Colonial Institutions of the British Empire.* The book was intended to provide knowledge about the constitutional situation of the colonies and other dependencies, information that was of utmost importance for the political awareness of English voters in Parliamentary elections. That knowledge could also contribute to strengthening the professional and commercial links that united the metropolis with British settlers.

Returning to the question of occupation, Creasy believed that not all Europeans had acted unethically when acquiring land in the colonies. He mentioned the classical examples of the fairness of the New England Puritans and William Penn, who had purchased the land from North American ‘chiefs’. Moreover, he gave Justice Marshall’s judgment in *Johnson v. McIntosh* as an example to illustrate the reversal of the legal policy followed with regard to North American peoples. According to Creasy, the case illustrated how the dispossession of North Americans had turned in the U.S. into a policy to protect their property. Europeans had no moral right to criticize the U.S., as most of the wrongs against North Americans had also been perpetrated by British colonists. But things were changing for better, and even within the British Empire non-Europeans had begun to receive better treatment.

Creasy limited the sphere of application of the right to occupy to vacant land. In order to do so, he used a standard based on stadial theory. He affirmed that in many of the territories visited by Europeans ‘natives were in considerable numbers’ and practiced agriculture to some extent. In Creasy’s own words: ‘they had attained a high degree of peculiar civilization’. The recognition of agricultural systems among non-Europeans was a welcome corrective to the general opinion of European intellectuals with regard to the non-European populations in America and Oceania. Creasy added that advanced non-European communities were not present everywhere Europeans travelled. In certain cases, he acknowledged, vast tracts of wild land were ‘roved over’ by a scarce number of wandering ‘savages’

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10 Ibid., Ch I 6.

11 Ibid.


13 Ibid., §219 211-214.

14 Ibid., 214.

15 Ibid.

16 Ibid., §216 208.

17 Ibid.
who could not be considered to occupy them.\textsuperscript{18} In these cases, ‘it could be fairly thought’ that European colonists could obtain a legitimate title by occupancy.\textsuperscript{19}

Who were those savages to whom Creasy referred? Edward Creasy viewed the world through the lens of a humanitarian colonial administrator. His treatment of the right to occupy reflected the legal position of the British Crown concerning its various overseas possessions. Accordingly, in North America he envisioned a policy of purchase of land from North American peoples. That policy was based in the presumption that North Americans were ‘often more or less agriculturalist’,\textsuperscript{20} to use Creasy’s words. They were the owners of the territories in which they lived.

But there were other kinds of savages. In the Pacific, British explorers had discovered new groups who they generally referred to as aborigines.\textsuperscript{21} Creasy placed them ‘among the most degraded specimens of the human race that have ever been discovered’;\textsuperscript{22} the pre-colonial population of Australia had ‘little or no civilization of their own’.\textsuperscript{23} In other words, they did not fit the category of advanced non-Europeans (‘more or less agriculturalist’ with some sort of ‘civilization’) to whom the occupation of territories did not apply. In the case of Australians, backwardness created the theoretical possibility for a land grab of continental proportions, an opportunity that, in practice, the British happily used to their advantage.\textsuperscript{24}

Australian peoples occupied one of the lowest places in Creasy’s hierarchical order of societies. But they were not the only non-Europeans who were downgraded in relation to the superior Europeans. Even those ‘natives’ with a ‘peculiar civilization’ did not withstand the comparison with the societies of progressive nations. This differentiation is evident in Creasy’s definition of international law as the set of rules that were operative between ‘all, or nearly all, civilized nations’.\textsuperscript{25} Non-Europeans’ lack of participation in the creation of the very law that legitimized inroads into their territories was not the only legal outcome of their assumed backwardness. For Creasy, ‘a very large proportion’ of the heterogeneous non-European peoples that were part of the human collage integrated into the British Empire were ‘unfit’ for enfranchisement.\textsuperscript{26} Among this large group of people whose limited capacity curtailed their right to

\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
\textsuperscript{21} In a footnote Creasy explained that he disliked the terms as he firmly believed in the unity of mankind. Creasy, \textit{The Imperial and Colonial Constitutions}, Ch VI 310, footnote 2.
\textsuperscript{22} Ibid., Ch VI 310.
\textsuperscript{23} Ibid.
\textsuperscript{24} The possibility of occupation of a desert country is also evidenced by Creasy’s treatment of the legal status of colonists in settler colonies. See Ibid., Ch III 66-71.
\textsuperscript{25} Creasy, \textit{First Platform}, Ch I §5 4.
\textsuperscript{26} Creasy, \textit{The Imperial and Colonial Constitutions}, Ch III 36.
cast a vote for the Imperial Parliament he mentioned the ‘Asiatics of India and the adjacent districts, the Hottentots and Kaffirs of the Cape, the Aborigines of Australia, the Esquimaux, and the Red Indians of the Hudson Bay territories’.  

A similar analysis of occupation is visible in one of the first treatises on international law of the second half of the nineteenth century. In 1860 the U.S. international lawyer Theodore Dwight Woolsey (1801-1889) published an Introduction to the Study of International Law. The subtitle of the first edition reveals that the book was intended to help students get acquainted with the discipline of international law. In fact, it was used as a textbook in Yale, where Woolsey taught history, political economy, and international law. Woolsey dedicated only a page and a half of his treatise dealing with the acquisition of territory. One of the modes in which states could acquire property was the occupation of vacant land. Traditionally other claims had been invoked in colonial times, but those claims were in his words ‘more doubtful or less generally acknowledged’. Here, he was referring to the papal bulls and the evangelizing mission with which the Spanish justified the conquest of the Americas. As he navigated historical waters Woolsey, as with the majority of nineteenth-century international lawyers, routinely referred to Spanish colonialism in order to track back the legal justification of European overseas expansion and the evolution of the doctrine of occupation.

Woolsey explained that European powers had traditionally claimed a title to occupy land in the territories that North Americans were not using for hunting. Still, he praised the more humane manner in which the English and the U.S. had acquired territories from North American peoples: the English colonies, for example, had purchased North Americans’ land. While most international legal treatises of the nineteenth century celebrated the fact that William Penn and the New England Puritans had bought the land from North American peoples, Woolsey generalized that story and the humanitarianism of the colonists, claiming that all English colonies had followed their example. He also affirmed that the U.S had extinguished North Americans’ titles to their territories by treaty and by always paying economic

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27 Ibid.
28 Theodore Dwight Woolsey, Introduction to the Study of International Law, Designed as an Aid in Teaching and in Historical Studies (Boston and Cambridge, James Munroe and Company, 1860).
30 Woolsey, Introduction to the Study, Ch II §53 118.
31 Ibid.
32 Ibid., 118-119.
33 Ibid., 119.
34 Ibid.
compensation for the taking of their lands. Woolsey was right that this was a more just and humane course of action—albeit one that paved the way for the eventual disenfranchisement of North American peoples. It was also a way of proceeding based on Marshall’s conclusion that the U.S. federal government had the ultimate power and prerogative of extinguishing whatever right North Americans’ had to the enjoyment of the territories in which they lived. Woolsey’s humanitarian tone concealed the fact that the ultimate legal power over the territories of savages was in the hands of Western nations.

Other points on which Woolsey converged with Creasy was the opinion that ‘savage or half-civilized tribes’ were not part of international law. A man of deep religious convictions, he defined international law as the norms that Christian nations used in their mutual intercourse. That religiosity also explains why Woolsey advocated that European colonialism and U.S. expansionism follow a humane course of action. But he never doubted that certain courses of action could be simultaneously unethical and legal. This explains why he referred to the Spanish legal justification for conquest as doubtful, a characterization that would be surprising to say the least from an ethical standpoint and one that most of his contemporaries also rejected emphatically from a legal perspective.

Criticism of imperialism and advocacy for the good treatment of non-European populations was not limited to Anglo-Saxon jurists. In Germany, Auguste-Wilhem Heffter (1796-1889) shared the humanitarian tone of Creasy and Woolsey. In 1873, coinciding with the founding of the Institut de droit international, his book Das Europäische Völkerrecht, first published in Berlin in 1844, was republished in French with the title Le droit international public de l’Europe. For Heffter, the right to occupy was applicable to ‘countries or island’ that were not populated or not entirely occupied. But no one, he continued, had the power to impose its rule on ‘wandering and even savage peoples’.

These two affirmations have to be read together. On the one hand, there was the possibility that European colonial powers could appropriate territories in countries that were not entirely occupied. That meant that in certain continents non-Europeans occupied some areas but not others. This belief reflected Vattel’s conviction that the territories where savages lived comprised more land than they could use. On the other hand, the lands that savages were actually using, and hence occupying, could not be taken from

35 Ibid.
36 Ibid., Introduction §5 5.
37 Ibid., 4.
38 His religiosity is underlined in Fisher, ‘Theodore Dwight Woolsey’.
41 Ibid., Livre I Ch II §70 142.
42 Ibid.
them. Moreover, Heffter affirmed that colonizing nations could not impose their jurisdiction, namely their government and laws, upon them.

Heffter’s position did not deviate from the general line of argument followed by international lawyers during the nineteenth century. Savages ought to keep their lands and could not be treated violently. To his credit, Heffter—unlike most of his contemporaries—also defended savages’ sovereignty, which meant that they could not be placed under the laws of the colonizing power. But in North America and Oceania, there were huge tracts of land that, according to European views, savages neither controlled nor used. Moreover, scholars like Heffter wrote at a time when it was generally believed that savages were becoming extinct. The impact of civilized societies had been fatal, and most savages were doomed for extinction.43 As their numbers plummeted, the territories where they lived seemed to European eyes even more uninhabited and unoccupied.

In principle, Heffter was not opposed to colonialism. In previous pages of his book he had discussed the possibilities for European nations to have colonies. They had a natural right to do so: ‘Nature’, he affirmed, did not ‘forbid nations to extend their empire on earth’.44 But that empire did not confer a right to subjugate non-Europeans.45 His criticism was mainly directed toward Great Britain. Referring again to nature, he claimed that it had not given a right to only one nation ‘to establish its domination anywhere’ it suited, even if occupation was made in the name of civilization, commerce, industry, or the exploitation of underutilized resources.46

The Argentinean Carlos Calvo (1822-1906) was another jurist who set a high bar for the protection of savages. Like Heffter, he rejected civilization as a ground for dispossessing savages.47 He applied to savages Marshall’s conclusions in Worcester v. Georgia about the juridical relationship between the federal government and North Americans, namely that states had no right to expel savages from their lands.48 In an inversion of the general scholarly trend of the period, he cited Vattel to demonstrate that they were possessors of the territories they inhabited.49 The territories of the savages could only be occupied with their authorization.50 The occupying state could then use the territory in common with

43 See Brantlinger, 45-67, 117-140.
44 Heffter, Le droit international, Livre I Ch II §70 142.
45 Ibid.
46 Ibid.
48 Ibid., 409.
49 Ibid.
50 Ibid.
savages or separately.\textsuperscript{51} In the last case, savages should be allowed to migrate in peace and offered equitable reimbursement.\textsuperscript{52} Colonizing states ought to follow the good example set by the New England Puritans and Quakers who had bought the land from North American savages.\textsuperscript{53}

Calvo did not entirely restrict the doctrine occupation. He used a standard of environmental exploitation to delimit its scope. Like all jurists of the period he acknowledged that colonizing nations had the right to acquire unoccupied land in ‘wild countries’.\textsuperscript{54} The application of that standard meant that, in the continents in which Europeans had settled, savages could not prevent Europeans from seizing the ecosystems and vast tracts of land that the former could not exploit. Latin American nations and the U.S. had inherited the right to those areas.\textsuperscript{55}

A second group of legal commentators did not recognize savages’ territorial rights. One such author was William Edward Hall (1835-1894). He dedicated much more space in his famous treatise on international law than Creasy, Woolsey, or Heffter on the elucidation of the doctrine of occupation.\textsuperscript{56} Although he explained in detail the rules that applied to occupation, he made only one mention of savages or barbarians. Most of his disquisition was dedicated to framing the scope of the right to occupy territory. As with most of his contemporaries, Hall believed that discovery could not per se create a title to acquire territory.\textsuperscript{57} Occupation was a valid title that needed the twin elements of intention (to occupy) and the actual seizing of unoccupied lands. But in order to be valid occupation had also to be followed by effective control.\textsuperscript{58} Control was assured either by establishing settlements or by exploiting the ecosystems of the acquired territory.\textsuperscript{59} Hall was here merely stating what constituted the generally accepted doctrine of the time.

Hall continued his exposition on occupation by referring to a set of questions that appeared in almost every contemporary manuscript on international law. These questions related to the extent of territory to which occupation applied, the amount of time that states had in order to make their acquisitions

\begin{footnotes}
\item[51] Ibid.
\item[52] Ibid.
\item[53] Ibid.
\item[54] Ibid.
\item[55] See infra footnote 79.
\item[57] Hall, \textit{International Law}, Part II Ch II §32 88-89.
\item[58] Ibid., 87-88.
\item[59] Ibid., 88.
\end{footnotes}
permanent, the authority of the individuals who appropriated territory, the need for a state ratification of individual acts, etc.\textsuperscript{60}

Hall did not refer to the situation of savages. Nevertheless, his position on this matter can be read between the lines. Hall clearly stated that occupation entailed a state’s appropriation of an area that was ‘unappropriated by a civilized or semi-civilized state’.\textsuperscript{61} Later in the book Hall made reference to another two categories: savages and un-civilized nations.\textsuperscript{62} For Hall there were three types of nations, according to their degree of civilization. In addition to these three groups, there was the non-state category of savagery. Savages did not constitute political communities. What is more, neither they nor un-civilized nations passed the threshold of civilization required to defend one’s territory. Only civilized and semi-civilized nations were protected against expansionism and imperialism.

This conclusion might be supported by Hall’s discussion of the abandonment of territory. One of the instances in which states abandoned an occupied territory was when they were expelled by savages or by other states.\textsuperscript{63} The only way in which the territory could return to a vacant condition was if the state that expelled the original occupant did ‘not attempt to set up a title for itself by conquest’.\textsuperscript{64} For Hall it was inconceivable that savages could establish a title by conquest or claim a title by prior occupation. There were more evidences in Hall’s text that the territories in which savages lived were considered vacant. Describing the way in which powerful nations usually colonized new territories, he affirmed that in general settlements were first establish on the coast.\textsuperscript{65} Beyond the coast there were vast stretches of ‘unoccupied country’.\textsuperscript{66} This, of course, was the case in North America, and Hall like other jurists of the period referred to the disputes between European powers and the U.S. over the territories of Louisiana and Oregon.\textsuperscript{67} The North American nations of these territories were totally absent from those discussions, and hence legally invisible.

Hall greatly amplified the power that occupation gave to colonial powers over non-European territories. The German Johann Caspar Bluntschli (1808-1881) shared Hall’s lenient views on the occupation of territories overseas. A founder of the \textit{Institut de droit international}, Bluntschli has been regarded as a

\textsuperscript{60} Ibid., 88-92.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid., Part II Ch IV §61 173.
\textsuperscript{63} Ibid., Part II Ch II §34 97.
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid., §32 91.
\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid., §33 92. The Oregon question was also debated in Creasy, \textit{First Platform}, Ch IX §226 217; Maine, \textit{International Law}, Lecture IV 69-70; John Westlake, \textit{Chapters on the Principles of International Law} (Cambridge, Cambridge University Press, 1894) Ch IX 169-170; Lawrence, \textit{The Principles}, Ch II §93 151.
‘liberal apologist for empire’. On closer scrutiny, however, his ideas do not seem to be too distant from the apparently more ethical and humanitarian views of Anglo-Saxon authors such as Creasy and Woolsey.

For Bluntschli, occupation did not apply to property over territory but to territorial sovereignty. His position anticipated the general agreement of the jurists of the last decades of the nineteenth century. He explained the kind of occupation that he had in mind by reference to the British colonists in North America. They had acquired the sovereignty of wild territories in order to improve them through agriculture. Bluntschli legitimized occupation by reference to a Vattelian rationale. States could extend their imperium over the lands of savages in order to stimulate ‘civilization and cultivation’. ‘The surface of the earth’, he continued, was ‘destined to be cultivated by man and humanity is destined to extend civilization over the earth’. The logic of progressive exploitation of ecosystems fell upon savages with full force. Bluntschli, like most of his contemporaries, assumed that savages did not till the ground. Moreover, he also maintained that they had no notion of territorial property.

Because civilization was a cosmopolitan goal, Bluntschli explained that civilized nations ought to extend their sovereignty over the maximum possible number of savage peoples. This is what the British had done in North America and Oceania, the Spanish and Portuguese in South America, and the Dutch in the islands of South East Asia. The savages of these lands could neither administer nor exploit them through the introduction of agriculture.

Although Bluntschli’s position was clearly imperialistic, he did not celebrate European colonial acquisitions in all cases. Based on the same cosmopolitan logic of exploitation of underutilized natural habitats he criticized the fact that colonial powers often appropriated territories that were too large for them to properly cultivate or govern. In doing so, they were preventing other nations from sharing the burden of colonization, thus hindering the progress of humanity. Without naming it explicitly,
Bluntschli—like Heffter and other German jurists—resented that it was Great Britain who profited most from colonialism.

The cosmopolitan goal of exploiting nature, and the need to do so to guarantee a nations’ control over vast tracts of land, looked rather different from the other side of the Atlantic. Carlos Calvo defended that the U.S., Mexico, and South American nations could extend their grasp over wild areas. Reversing Bluntschli’s logic, Calvo maintained that in those large areas not inhabited by savages, colonization and administration could proceed gradually.79

In spite of Bluntschli’s enthusiastic endorsement of European expansion, he was far from embracing imperialism wholeheartedly. He neither advocated the ill-treatment of non-Europeans nor the disregard of all their rights. Actually, he claimed that savages could not be expelled from their territories,80 they could migrate in peace and ought to receive economic compensation.81 That was not a very different language from that which Creasy and Woolsey had used. Of course, as the story of U.S.-North Americans’ relationship attested, the line that separated expulsion from ‘peaceful migration’ was a thin one.82 Bluntschli added that civilized nations ought to strive for the improvement of savages by instructing and leading them to higher civilization.83 But they also had the duty to respect savages’ modes of production and avoid at all cost their mistreatment.84 Savages could choose the way of life that suited them the best. Accordingly, they could not be prevented from cultivating or hunting.85 Based on this ethical position he followed Creasy in criticizing the Spanish conquest and advocating the conduct followed in North America by William Penn and the Puritans of New England.86

Towards Berlin: Henry Maine and the changing nature of occupation

Writing at the end of the 1880s, Henry James Summer Maine (1822-1888) defined the occupation of vacant land in the same way as Hall, as one of the three rights that a sovereign state possessed.87 He also

79 Calvo, Le droit international théorique, Tome I Prêmiere Partie Livre V §281 409.
80 Bluntschli, Le droit international, Livre IV §280 171.
81 Ibid.
82 Under the economic impetus of the colonists, the territories of North Americans were under constant pressure. In this context, their choice was limited. The fact that they peacefully accepted relocation thus did not amount to an exercise of their free will.
83 Bluntschli, Le droit international, 172.
84 Ibid.
85 Ibid.
86 Ibid.
followed Hall in emphasizing the two elements needed for occupation: the material element, concretized in ‘physical contact’; and the intention to apprehend vacant territories. But, unlike Hall, he directly looked at the question of whether the territory of savages and barbarous tribes could be occupied.

Colonial history provided a good standpoint from which to conduct that inquiry. At the time of the Spanish conquest in Latin America the general practice was to consider the title of pre-colonial populations as void due to their infidel condition. The problem with the evangelizing mission in Spanish America was that Spanish rule imposed a system of forced labor and great cruelty. Without excusing it, Maine noted that Queen Isabella’s sincere desire to tackle this question was weakened by the missionaries’ conviction that Latin American peoples would retreat ‘into the wilds’ if relieved of their work obligations. Despite criticizing Spanish colonial policies, Maine noticed with approbation that they had managed to assimilate ‘white and colored races’.

The colonization of North America was the final test for the right of occupation in contemporary history. The notable European communities and individuals who, according to Maine, courageously changed the unethical course of European colonization are by now familiar. In contradistinction to the rudeness of Spanish and most English colonists, Maine praised the humanitarianism of William Penn and other Quakers. Maine then looked at the contemporary ‘legal doctrine’ on occupation, citing Marshall’s conclusions in Johnson v. McIntosh. According to Marshall, the British title over American territory which was inherited by the U.S. had extinguished all rights of pre-colonial peoples, save for their right to occupy land. The federal government had the authority to extinguish that title by ‘conquest or purchase’.

Savages were possessors, but not owners of territory. Progressive nations could therefore acquire their territories. But this right was accompanied by the humanitarian duty of reserving and not taking away the land that savages required for subsistence. Considering the deadly impact that Great Britain had historically had on the ‘savages’, it is save to affirm that this duty was far from a serious limitation of the scope of occupation. Moreover, this limitation could be circumvented if ‘sufficient provision’ was ‘made

88 Ibid., Lecture IV 69.
89 Ibid., 72.
90 Ibid., 73.
91 Ibid., 73.
92 Ibid.
93 Ibid., 74
94 Ibid.
95 Ibid.
96 Ibid.
97 Ibid.
for their subsistence by agriculture or by hunting’. 98 This behavior, Maine explained, had become general practice as all imperial powers now allocated some land for the subsistence of all ‘savage natives’. 99

Maine wrote at the end of the 1880s when an epoch in the history of European expansion and overseas occupation was coming to an end and a new period was about to start. As Maine noted, the times in which Europeans found new territories inhabited by savages were passing away. The non-Europeans which Europeans had to deal with now had passed the stage of civilization characteristic of savage life. 100

In a manuscript republished in French in the same year as Maine’s lectures Carlos Calvo agreed that at the end of the nineteenth century there was little land to be discovered, a conclusion shared by the British jurist Thomas Joseph Lawrence (1849-1920). 101 Exploration had substituted discovery in unearthing the secrets of all corners of the world. 102 As Hall noted in the 1895 edition of his treatise on international law, only a few regions in the interior of Africa had evaded the colonizing influence of the West. 103 Due to the change of colonial scenario, the doctrine of occupation, as it had been generally understood for most of the nineteenth century, was becoming obsolete. Occupation, Lawrence argued, seemed to be at the time a question of mere ‘historic interest’. 104

In 1868, writing about territorial aggrandizement, Farrar Mountague Bernard (1802-1882) rhetorically asked whether there was ‘a square yard of soil on the whole surface of the world that any sensible Englishman wished to see annexed to the British Empire’. 105 Bernard answered in the negative. 106 He criticized previous European intestine wars and conversely celebrated the ‘pacific decorous diplomacy’ of his time. 107 He did not live long enough to see that ‘decorous’ Western ‘diplomacy’ being once again deployed in service of European imperialism to the great detriment of African peoples and their ecosystems.

98 Ibid.
99 Ibid.
100 Ibid., 74-75.
101 Calvo, Le droit International théorique, Tome I Prémier Partie Livre V §266 388. See also, Lawrence, The Principles, Part II Ch II §93 146.
103 Ibid.
104 Lawrence, The Principles, Ch II §92 144.
106 Ibid.
107 Ibid., 73-76.
Enter barbarian tribes: the Berlin Conference and the occupation of Africa

In the nineteenth century, the British Empire was the indisputable hegemonic maritime power. At its apex, the Empire encompassed a territory that amounted to a quarter of the globe and comprised over a quarter of the world’s population. But for a long time the British were reluctant to undertake the direct administration of their colonies.\(^{108}\) Thus, for instance, the British EIC ruled the Indian Subcontinent for a century, from 1757 until the Mutiny in 1858. Similarly, British economic hegemony in Latin America was maintained without challenging the formal sovereignty of Latin American nations.\(^{109}\)

As Jeremy Bentham, James Mill, and Mountague Bernard among others observed, conquest and imperial administration were indeed burdensome.\(^{110}\) The Scottish international lawyer James Lorimer (1818-1890), Professor of Public Law at Edinburgh, was of the same opinion. The white man’s burden of civilizing inferior races had a limit. Giving as example, the high costs incurred by Great Britain during the ‘Zulu war’, Lorimer argued that colonialism should never compromise the material resources needed for continued progress in the metropolis.\(^{111}\) That was too costly a price to pay. Similarly, Western policy makers were convinced of the inconvenience of carrying the burden of ruling non-European territories and peoples. Informal rule through trading companies was a convenient intermediate between direct rule and non-intervention. It allowed Western nations to reap the benefits of colonization without having to bear all the costs.\(^{112}\) It was enough to sign treaties with nations or chiefs that assured imperial powers access to lands and ports or granted special protection to their missionaries and traders.\(^{113}\) Private interests rather than public power ran the colonial world during most of the nineteenth century.

This state of affairs changed in the last quarter of the century. From 1879 to 1882 European states entered a frantic race to acquire portions of the African continent. Whereas by the 1870s only a fraction of Africa—limited to its coasts—was occupied by European nations, from the mid-1880s the interior of the continent came under increasing European influence.

The reasons for the scramble for Africa are disputed. The economic benefit of African colonization is far from obvious. Acquiring and keeping an empire was a very costly enterprise, and Africa offered little...

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109 Ibid., 19.
110 Bernard remarked that ‘foreign conquest is now not thought so profitable a thing’. Bernard, *Four Lectures*, Lecture II 76.
113 See Koskenniemi, *the Gentle Civilizers*, 110-112.
in return. Few capitalists were interested in investing in Africa.\textsuperscript{114} Trade in the continent was also negligible. For instance, the Belgian Congo, one of the economic jewels of Africa, contributed only one percent of Belgian trade.\textsuperscript{115} Moreover, African trade with Europe had reached its maximum level in the second half of the eighteenth century due to the trade in human beings, the slave trade, declining thereafter.\textsuperscript{116}

None of these meant, however, that economic reasons did not play an important role. The discovery of diamonds in Kimberley in 1866 and gold in the Transalvaal in 1885 allowed a few British individuals to amass immense fortunes.\textsuperscript{117} It is likely that other European powers were attracted by the same possibility of finding new sources of natural wealth and carrying on trade in the interior of the continent. This hope was reinforced by the stories of influential explorers such as Henry M. Stanley or Heinrich Barth who spoke authoritatively about African riches and the potential for trade in the continent.\textsuperscript{118} Livingston too helped in consolidating a view of British imperialism ‘that fused moral purpose with the civilizing functions and values of commerce’.\textsuperscript{119} Besides, particular business groups—like the commercial companies of Marseille—and individuals like King Leopold and Cecil Rhodes, who became extremely rich through their economic ventures in Africa, were able to adopt or influence state policies of territorial acquisition that favored their economic interests.\textsuperscript{120}

Be that as it may, Western powers gathered in Berlin during 1884 and 1885 with the intention of fixing the rules whereby Africa was to be colonized and partitioned between colonial powers. Those rules included the question of how to legally occupy territory. Articles 34 and 35 of the General Act of the Berlin Conference were devoted to this question. With the change of colonial scenario it became evident

\textsuperscript{114} Norman R. Bennett, \textit{Africa and Europe: From Roman Times to Present} (New York, Africana Publishing Company, 1975) 86.


\textsuperscript{117} Lewis Henry Gann and Peter J. Duignan, \textit{The Burden of Empire: An Appraisal of Western Colonialism in Africa South of the Sahara} (Stanford, Hoover Institution Press, 1967) 195.


to colonial powers that, for a number of reasons, the occupation of African could not be identical to the appropriation of Australia and northern North America by the British and the U.S.

Africans, unlike Australians and North Americans, did not experience a population collapse due to contagious diseases. The fact that Africans had had contact with Europeans since time immemorial made them more resistant to European germs. Despite millions of victims of brutal conquest and slave trade, African polities were often highly populated. Actually, the tendency reversed in the sense that it was now European colonists who were dying in great numbers in the African tropics. For Europeans, Africa had become the white’s man grave.\(^{121}\)

Although European mortality in tropical Africa only started to decrease during the last quarter of the century, it still remained high compared to non-tropical areas.\(^ {122}\) Based on his geographical knowledge Ernst Georg Ravenstein (1834-1913), a German geographer and cartographer who worked most of his life in England, declared in front of the British Royal Geographical Society that the tropics were unsuitable for European settlement.\(^ {123}\) Nature imposed a series of limits upon humans that according to Ravenstein were impossible to change. As he put it: ‘To render tropical countries fit places of residence for European colonists it will be necessary either to change the constitution of Europeans or to bring about a change in the climate.’\(^ {124}\)

For Europeans it was also difficult to replicate in the tropics the economic approach to colonization followed in the temperate regions of Australia and North America. Mild weather or at least a climate similar to that of Great Britain made it easier to adopt modes of production suitable for landscapes that resembled those of the metropolis. Pastoralist and agricultural communities fared much better in the coast and prairies of North America and the southern coasts of Australia than in the African tropics. The possibility of creating ‘Neo-Europes’ in Africa following North American and Pacific models was out of the question.

For nineteenth century international lawyers, the population of Africa also differed from the savages of Oceania and North America. As Maine hinted, that distinction was based on their different level of social progress, determined in accordance with the social categories of stadial theory.\(^ {125}\) While Australians and


\(^{122}\) Ibid., 75-88.


\(^{124}\) Ibid., 30.

\(^{125}\) See supra footnote 100.
North Americans were almost invariably regarded by Europeans as savage hunter-gatherers, Africans in turn were considered agriculturalists. They were also deemed to have political communities. And, of course, these two facts affected their status in international law. As Maine recognized, Africans were ‘assumed’ to live in ‘organised community’, and importantly to be ‘in possession of the land’.\footnote{Maine, \textit{International Law}, Lecture IV 75.}

Apart from these factual changes that affected the context in which the doctrine of occupation operated, there were also relevant conceptual variations derived from the new outlook of the discipline of international law after the creation of the \textit{Institut de droit international}. The ascendancy of positivism and the emergence of states as centerpieces of international life and international law influenced the way in which the doctrine of occupation was understood.\footnote{The link between these changes and Western imperialism in the nineteenth century is best described in Anghie, \textit{Imperialism}, 21-114.} Sovereignty rather than private property became the focus of attention. While previously state’s sovereign power (\textit{imperium}) and private property (\textit{dominium}) had been considered as separate elements, at the end of the century the latter was subsumed within the former. The way in which a state related to its territory was not comparable to individual proprietorship, a question that pertained to the sphere of private law. International law and public law dealt solely with states’ territorial sovereignty.

For the international lawyers of the end of the nineteenth century the world was a conglomerate of states. Statehood also had a normative dimension. International lawyers believed that the surface of the Earth ought to be parceled between states because these modern political entities were the harbingers of progress. In consequence, they maintained that only states were international actors, a status that gave them legal agency in the grand scheme of the world. Any other political formation or human community that did not share the characteristics of European states and European civilization were considered legally irrelevant or, at least, not politically mature enough to have their own voice. Anghie has demonstrated how sovereignty acquired its specific legal contours in the imperialistic process of being projected over a supposed inferior Other.\footnote{Ibid.} Only when European sovereignty was consolidated as the measuring stick of political status and international agency could the world be recreated as a political emptiness that had to be filled anew.

The sovereign power associated with Western statehood and the imperial mission of its dissemination acquired such an importance and pull only by contrast to what they were destined to remedy: the existence of inferior non-European political formations with no endogenous capacity for progress. European
imperialism created its own purpose by defining most non-European peoples in opposition to the progressive standard they believed they incarnated. In Africa, supposedly void of states and civilization, European colonialism was naturally presented as a progressive instrument for the creation of modern political communities that could be agents of transition toward progressive and civilized economic and political life.

As Lawrence and Hall noted, with the scramble for Africa the doctrine of occupation was again at the forefront of international legal discussion.\textsuperscript{129} This revival was caused by the ‘earth hunger of the Old World’.\textsuperscript{130} But the doctrine of occupation now had a novel outlook. When international lawyers debated occupation at the end of the nineteenth century, they often referred to the African territory as \textit{territorium nullius}.\textsuperscript{131} John Westlake (1828-1913) properly described this change in his treatise on international law:\textsuperscript{132} territorial sovereignty, he argued, was not the same as property.\textsuperscript{133} Neither the government, nor the King or Queen, nor even the people as a whole, Lassa Oppenheim explained, were owners of the territory of a state.\textsuperscript{134} Accordingly, the question with regard to occupation to which international law turned its eyes from the Berlin Conference onward was whether ‘an uncivilized region may be internationally recognized as appropriated in sovereignty to a particular state’.\textsuperscript{135} Oppenheim firmly believed that occupation entailed ‘the acquisition of sovereignty’ over a territory.\textsuperscript{136}

Just when it seemed to be losing its historical importance, the scramble for Africa elevated occupation to the central stage in international legal textbooks. The French jurists Salomon and Jezé dedicated a whole manuscript to studying the question of territories without master. In contrast with the few pages that earlier commentators devoted to the legal treatment of the doctrine of occupation, John Westlake dedicated a whole chapter of his treatise to the topic. He paid particular attention to the question of what to do with the ‘natives’. Westlake was an apologist of empire, and his tone throughout the discussion

\begin{footnotesize}
\begin{enumerate}
\item Hall, \textit{A Treatise}, Part II Ch II §33 118-120; Lawrence, \textit{The Principles}, Part II Ch II §92 144-145.
\item Ibid., 145.
\item See the discussion in Fitzmaurice, \textit{Sovereignty}, Chapter 9, 271-301. There were exceptions, such as Lawrence, who talked about ‘\textit{res nullius}’ rather than ‘\textit{territorium nullius}’ and continued referring to occupation as a doctrine concerning the acquisition of both sovereignty and dominion (property). See Lawrence, \textit{The Principles}, Part II Ch II §93 146. This conception was in line with his belief that States had ‘proprietary rights over definite portions of the earth’s surface’. See Lawrence, \textit{The Principles}, Part II Ch II §90 136.
\item Westlake, \textit{Chapters on the Principles}.
\item Ibid., Ch IX 129-133.
\item Westlake, \textit{Chapters on the Principles}, Ch IX 134.
\item Oppenheim, \textit{International Law}, Part II Ch I XI §210 266 (italics in the original). It is worth mentioning that not all international lawyers shared this approach. Hall, for example, maintained that states had rights of private property. See, Hall, \textit{International Law}, Part I Ch II §9 38; Hall, \textit{A Treatise}, Part I Ch II §9 47.
\end{enumerate}
\end{footnotesize}
remained bluntly paternalistic, if not downright racist. According to him, ‘uncivilized populations’ had moral but not legal rights. Therefore, their relationship with colonial administrators was like that of the ‘ignorant and helpless’ to the ‘enlightened and strong’. The treatment of the ‘natives’ was a question purely related to the conscience of the state that administered them.

For Westlake the ultimate criterion for the occupation of territory was civilization. But the standard of civilization was not predicated on a cultural distinction between the ‘mental or moral characteristics’ of civilized and uncivilized populations. For him, no social or cultural aspect was a decisive element for judging social progress; what counted was when Europeans came ‘into contact with American or African tribes’ was ‘government’. Government allowed ‘people of European race’ to enjoy the ‘complex life’ that they could have in their home countries.

Considering the ideas of Westlake, the standard of occupation seemed to be shifting after Berlin from the improvement and exploitation of ecosystems to the political organization of populations. Before Berlin, Creasy had defended the rights of non-European advanced peoples because they were ‘more or less agriculturalists’. Similarly, Bluntschli linked civilization and the improvement of nature through agriculture. Even Heftler’s anti-imperialist critique of Great Britain’s imperialism included justification based on the exploitation of idle natural resources. Besides, most jurists agreed that wild territories could be occupied by nations that could exploit them by introducing agriculture and trade.

Despite the references to government, stadial theory and the standard of environmental exploitation remained central to Westlake’s understanding of non-European peoples and territories. When he discussed whether treaties with ‘natives’ had any validity in international law he defended the idea that the only thing that ‘uncivilized’ populations could transfer was the property of their land. This conclusion was drawn by reference to stadial theory. Savages and nomads had little notion of landed property. That was not the case for the settled agricultural populations of Africa, who had a clear understanding of private property over land, an institution indispensable for the cultivation of the soil. Both savages and agriculturalists practiced trade, even if that practice was sometimes restricted to barter. But uncivilized

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137 Westlake, *Chapters on the Principles*, Ch IX 140.
138 Ibid.
139 Ibid., 143.
140 Ibid., 141.
141 Ibid.
142 Ibid.
143 Ibid., 144.
144 Ibid.
145 Ibid., 144-145.
peoples could not cede what they did not have any notion of. That limitation was applicable to sovereignty.\footnote{Ibid., 145.}

Did the fact that African ‘tribes’ were agriculturalists and hence ‘in a stage of advancement higher than that of the redskins’ mean that Europeans could not seize African natural resources?\footnote{Ibid., 150.} Was the standard based on the progressive exploitation of ecosystems no longer valid? Westlake’s position on this matter was unequivocal. He still believed that, due to their superior mastery over nature, Westerners ought to have preeminent access to the unexploited natural wealth of Africa. In the racial jargon of the era he expressed his conviction that: ‘The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed … If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route …’\footnote{Ibid., 142-143.}

Westlake clearly understood the economic interests that the British Empire, or at least some of its most influential subjects, had in occupying Africa. But the effective occupation of land and the administration of uncivilized peoples did not only signify gains. It also imposed the duty of civilizing non-Europeans and guaranteeing their wellbeing.\footnote{But, importantly, Westlake defended that the civilizing mission was not a ground to acquire title if it was not accompanied by the actual occupation of the territory to be civilized. Ibid., 174-177.} In fact, one of the requirements of occupation was the administration of the occupied territories and the establishment of an authority that was able to guarantee the protection of the pre-colonial population.\footnote{Ibid., 159.} In the international legality of the end of the century this condition was something more than a simple wish stemming from the humanitarian impulse of international legal scholarship: it was now part of the positive body of international regulations. Westlake underscored the fact that it had been agreed by all European powers at Berlin. Article 35 of the General Act of the Berlin conference read as follows: ‘The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights.’\footnote{General Act of the Berlin Conference of 1885-1886, February 26, 1885, Ch I art. 35.}

It seemed that European profit could not now be made at the expense of the populations under European rule.

Westlake continued his disquisition on the doctrine of occupation, examining several questions to which jurists of previous periods had given a great deal of attention. Among them were the questions of

\footnote{General Act of the Berlin Conference of 1885-1886, February 26, 1885, Ch I art. 35.}
an inchoate title based on discovery or occupation, the requirement of notifying other powers of occupations made in Africa, the extent of occupation, and the authority of those making land acquisitions.\(^{152}\)

In contrast to Westlake, other British international lawyers such as Thomas Joseph Lawrence (1849-1919) seemed to have a more pluralistic conception of international law. Westlake had defined the society of states as that which had European civilization. Similarly, Lawrence defined international law as the set of rules applicable between civilized states.\(^{153}\) But, for him, there was not only one international law. In fact, he believed that different peoples had different systems of international law.\(^{154}\) This legal pluralism did not, however, entail equality. International law was the most important of these systems as it had been adopted by all civilized states.\(^{155}\) Moreover, according to Lawrence, the modern definition of international law as a system between states made it entirely impossible for ‘nomadic tribes’ to be part of it.\(^{156}\)

In international law, Lawrence explained, title to territory may be acquired originally through occupation. States and their sovereign power were the defining standard for occupation. Therefore, the right to occupy could be exercised over all territories that were ‘\textit{res nullius},’ that is, places that were not part of any ‘civilized state.’\(^{157}\) For Lawrence the label vacant land or ‘\textit{res nullius}’ was not limited to uninhabited territories.\(^{158}\) ‘Savage tribes’, who ‘roamed over’ large expanses of land could not retain their territories.\(^{159}\) Even non-European polities with a higher level of civilization and political organization could not prevent Europeans from legally seizing their lands.\(^{160}\) Only the highest international legal standard—the achievement of full sovereignty and statehood—could prevent the application of the right to occupy.\(^{161}\)

Non-Europeans did not fare well in Lawrence’s scheme. Following Westlake, he affirmed that ‘natives’ had moral rights but did not enjoy legal status.\(^{162}\) That characterization, of course, hindered their international legal personality. Lawrence noted the contradiction between the fact that, on the one hand,


\(^{153}\) Lawrence, \textit{The Principles}, Part I Ch I §1 1. A similar definition can be found in Hall, \textit{International Law}, Introduction 1; and Oppenheim, \textit{International Law}, Introduction Ch I §1 1.

\(^{154}\) Lawrence, \textit{The Principles}, Part I Ch I §4 4.

\(^{155}\) Ibid.

\(^{156}\) Ibid., Part II Ch II §90 136.

\(^{157}\) Ibid., Part II Ch II §93 146.

\(^{158}\) Ibid.

\(^{159}\) Ibid.

\(^{160}\) Ibid.

\(^{161}\) As he put it: ‘All territory not in the possession of states who are members of the family of nations … must be considered as technically \textit{res nullius} and therefore open to occupation.’ Ibid.

\(^{162}\) Ibid.
‘natives’ were not even noticed in international documents and their rights were ignored and, on the other hand, that European powers regularly made treaties with them for the purpose of occupying their lands.\footnote{Ibid., 154-155.} Lawrence resolved this conundrum in a similar way to Westlake by distinguishing between private property and sovereignty. Non-Europeans could not cede what they did not have—sovereignty—so treaties with them were not valid under international law. Occupation was effective only between the civilized communities that were subjects of international law.\footnote{Ibid., 155.}

But, for Lawrence, treaties with non-Europeans were not inconsequential. They pertained to the ethical conduct of European colonialism. Non-Europeans had to be ‘treated with fairness’ and ‘justice’;\footnote{Ibid.} they could not be legally dispossessed. Accordingly, Vattel’s argument that savages had too much land, which legitimised Europeans’ taking of their lands, was strongly criticized by Lawrence.\footnote{Ibid.} Did this mean that the standard of exploitation of natural habitats was no longer valid? How could the duty of treating ‘native races’ with ‘justice and humanity’ be reconciled with Europeans’ occupation of non-European territories in order to undertake their superior economic practices?\footnote{Ibid.} The answer, Lawrence believed, was not as straightforward as one may think at first sight.

Lawrence hesitated on the question of whether Europeans could exercise their superior economic activities of trading, farming, and mining in the colonies based on concessions made by non-Europeans.\footnote{Ibid.} For him, the definite measuring stick was the way in which the civilizing mission was carried out. Sometimes, civilization had proceeded in a humanitarian way and had resulted in the improvement and general benefit of non-Europeans.\footnote{Ibid.} But, at times, civilized rule had been lethal. Under the impact of the colonizer several tribes had disappeared like ‘grass before a prairie fire’.\footnote{Ibid., 156.} As a result of the disparity of historical experiences no general rule could be easily laid down. But, self-pressed to take a stand on the question, Lawrence bent toward civilization. He was sure that in the cases when ‘the representatives of superior and inferior races come into contact, the former must prevail’.\footnote{Ibid.} But even if that was the case, it is important to remember that, for Lawrence, European rule and the civilizing mission ought to be
carried out for the benefit of non-Europeans and not for personal profit.\textsuperscript{172} Economic progress ought to be inspired by and reflect a cosmopolitan impulse.

Lassa Oppenheim shared with his British colleagues the idea that the world was only composed of states. This meant that the geographical space of any political formation that was not a state could be occupied by any member of the ‘Family of Nations’.\textsuperscript{173} For example, wandering tribes with a system of government were not regarded as states so long as they had an unsettled existence.\textsuperscript{174} Similarly, a territory in which there were ‘natives’ with some kind of ‘tribal organization’ did not need to be deemed a state.\textsuperscript{175}

In his treatise, Oppenheim summarized the general theory on occupation. In order to be effective, occupation needed to be preceded by possession of the object of occupation, which in practice amounted to settlement of the territory.\textsuperscript{176} Possession, in turn, had two elements: ‘corpus’, or the actual taking of the object; and ‘animus’, the intention of taking it with the purpose of acquiring sovereignty over it.\textsuperscript{177} But possession was not enough. Following Article 35 of the Final Act of the Berlin Conference, Oppenheim argued that occupation was only effective when possession was followed by the actual administration of the territory.\textsuperscript{178}

Non-European territories were the object of European acquisition of sovereignty. The inhabitants of those territories did not form states. They had political systems, but their superiors were the heads of ‘tribal communities’ rather than states.\textsuperscript{179} Oppenheim, like Westlake and Lawrence, differentiated between non-Europeans’ sovereignty and their rights to private property. Lack of sovereignty limited non-Europeans’ agency: this is why treaties in which ‘natives’ agreed to submit to the occupying power were invalid.\textsuperscript{180} They could not cede something they did not have and normally did not understand.\textsuperscript{181} Agreements made with the chiefs of ‘natives’ had only moral value,\textsuperscript{182} and non-Europeans had no international legal status. Nevertheless, a lack of sovereignty did not preclude the recognition of pre-existing rights of private property.\textsuperscript{183} In other words, non-Europeans could keep the private property they possessed before European arrival.

\begin{thebibliography}{9}
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\bibitem{173} Oppenheim, \textit{International Law}, Part II Ch I XI §209 263.
\bibitem{174} Ibid., Ch I I §168 217.
\bibitem{175} Ibid., Ch I XIII §221 276.
\bibitem{176} Ibid., §222 276.
\bibitem{177} Ibid (italics in the original).
\bibitem{178} Ibid., 276-277.
\bibitem{179} Ibid., §226 281.
\bibitem{180} Ibid., §222 277.
\bibitem{181} Ibid.
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\bibitem{183} Ibid., §228 282.
\end{thebibliography}
The distinction between sovereignty and private property marked a definite turning point between the traditional conception of occupation and the modern one. As Oppenheim explained, traditionally it was considered that occupation conferred a title to private property over the whole territorial space occupied. The colonizer acquired both sovereignty and private property over the land. That was no longer the case. Occupation was limited to sovereignty. For non-sovereign non-European populations things had changed for the better—or so international commentators believed.

Did respect for the private property of colonized populations impede the European progressive and cosmopolitan mission of exploiting underutilized ecosystems? For Westlake the answer was a definite no. As mentioned above, he declared that in Africa whites could not be prevented from cultivating the available land, extracting its mineral wealth, and carrying on commerce. Similarly Lawrence, despite criticizing Vattel, thought that Western farming, mining, and trading could be and often had been reconciled with the interests of the pre-colonial population.

So, the standard of exploitation of ecosystems did not entirely go away by the end of the nineteenth century. In fact, it was consecrated in some of the legal international texts of the period. This was the case, for example, of the English translation of *Il diritto internazionale codificato e la sua sanzione giuridica*, first published by the Italian jurist Pasquale Fiore (1837-1914) in 1890. Of all authors it was Fiore who most firmly invoked a standard of environmental exploitation. He maintained that colonization and imperial expansion were legitimate, but the legitimacy of the extension of Western rule over non-European populations, he acknowledged, was a complex matter. The final criterion to judge the soundness of Western imperialism was the protection of the rights of non-European peoples in the same way as those of ‘civilized nations’. Nonetheless, legal humanitarianism did not mean that the rights of Europeans and non-Europeans were the same.

According to Fiore, one of the reasons that justified the expansion of Western nations was the existence of underutilized areas of the Earth that were of no use to uncivilized populations. Following this Vattelian rationale he claimed that:

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184 Ibid., 282-283.
185 See supra footnote 148.
186 See Lawrence, *The Principles*, Part II Ch II §96 156.
187 In this sense see supra footnote 1.
188 Fiore, *International Law Codified*, Ch II §16 46.
189 Ibid.
190 Ibid.
The earth is in general designed to serve the needs of everyone and that it is not permissible that savages who are unable to derive any profit from natural products should be allowed to leave sources of wealth unproductive, leaving the ground uncultivated.\footnote{191}

This statement did not amount to a complete denial of the rights of pre-colonial populations. In fact every human being, a category that included savages and wondering tribes, had a number of natural rights that were inherent to his or her person.\footnote{192} These rights integrated what Fiore called the laws of humanity, a set of rights that belonged to humans, which could not be derogated from, and ought to be respected by colonial powers in their dealings with ‘barbarous tribes’.\footnote{193} Among those rights were private property, trade, and freedom of movement.\footnote{194} Uncivilized and independent tribes had not only personal rights: they were also entitled to international rights and international legal personality.\footnote{195}

Fiore defined ‘independent tribes’ as those who were settled in a particular territory, who had their own legal norms, and integrated a political community, having ‘a government capable of commanding the respect of the fundamental principles of international law’.\footnote{196} In case ‘uncivilized’ non-European peoples fulfilled those requirements, their first right was the application of international law to ‘de facto relations … with civilized states’.\footnote{197} This entitlement basically came down to the right of ‘barbarous tribes’ to keep the lands which they occupied and the subsequent obligation of the colonizers to obtain the tribe’s consent to the occupation of those lands.\footnote{198} The second international right applicable to tribes, connected with the first, was the prohibition of conquest.\footnote{199} These two limits imposed on ‘civilized’ states in their colonial ventures were supplemented by a series of duties. It was incumbent upon civilized powers to promote the spreading of civilization and the cultivation of international law among the uncivilized.\footnote{200}

The application of international law to ‘independent tribes’ did not translate into automatic legal equality.\footnote{201} International law was applied differently to its various legal subjects—‘civilized, uncivilized and barbarian nations’.\footnote{202} Moreover, international law was applied to uncivilized tribes in a flexible way,
as it was always subject to ‘historical and moral exigencies’. This provided civilized states a certain space for maneuver in their dealings with uncivilized peoples. Moreover, despite having a certain status, tribes were always found wanting when compared to civilized nations. Only the latter were full members—in the sense of having all the rights—of the international community, or as Fiore called it, the ‘Magnas civitas’. When confronted with the superior mirror of the civilized state, Fiore defined a tribe as a body of people that lacked ‘political organization’ and had no rules and mores comparable to those of civilized states.

Non-European societies had a political and legal status which allowed them to be at the same time inside and outside the international legal system. As for Vitoria, they were advanced enough to deserve the enjoyment of natural rights and humanitarian treatment, but their status was always lacking when compared with the full members of that system. This logic of inclusion/exclusion allowed their societies to be placed within the power of superior political formations. Progress was created out of that contact, as more advanced societies drove the less progressive toward higher human achievements.

What were the effects of occupation over non-Europeans? First, there were protectorates, colonial possessions over which the occupying state acquired imperium or sovereignty. In cases where there were tribes in the zone under colonization, states ought to respect their rights. Did this mean that they needed the consent of the uncivilized tribes in order to establish a protectorate? Were the treaties signed with tribes a valid title for occupation? Like his British counterparts, Fiore answered this question in the negative. He believed that agreements signed with local chiefs did not constitute a valid legal ground for occupation due to the ignorance of those leaders. As Fiore put it, treatises had no legal effect because natives could not cede ‘what they are not conscious of possessing’.

Regarding property, Fiore distinguished two cases. On the one hand, if non-European territories were inhabited and occupied by barbarous nations, if these ‘savage tribes’ had chiefs who were invested with sovereign power, imperial powers ought to reach an agreement with them and pay compensation before acquiring their lands. In the territories which were not exploited by savage tribes—that is, vacant or unoccupied lands—the agricultural argument applied with full force. The rationale of this argument is by

203 Ibid., Book I Title I §78 115.
204 See, for instance, Ch II §13 34, §14 36, Book I Title II §86 117.
205 Ibid., Book I Title II §86 117.
206 Ibid., Book III Title II §1040 423.
207 Ibid., Book III Title III §1061 423.
208 Ibid.
209 Ibid., Book I Title II §98 120, Book III Title II §1062 423-424.
now familiar: savages could not retain the excess of underutilized land because Western nations could better exploit them.\textsuperscript{210} But even in this second case the legitimacy of the occupation was conditioned by the obligation to conduct colonization in a peaceful and just manner.\textsuperscript{211}

Western imperialism could fill the blank spaces of the world—in other words, the land areas that did not constitute a state and did not belong to a state.\textsuperscript{212} The African continent was now ripe to be administered by the establishment of protectorates.\textsuperscript{213} If carried out peacefully, colonialism and civilization were a blessing for humanity. Progressive nations could exploit idle natural resources, promoting the improvement of global material conditions. The expansion of industrial capitalism was the engine of human affluence. This is why, as Fiore noted, Western imperial powers ‘could extend the field of their activity and production, so as to satisfy their ever increasing needs through an increase of wealth’.\textsuperscript{214} It was the force of this cosmopolitan goal that imperialism incarnated that led Fiore to affirm that even in cases where negotiation with ‘natives’ was necessary to secure the cession of land, and outside the use of force, ‘the indirect and passive means for inducing them to yield their territory to colonization must be regarded as lawful’.\textsuperscript{215}

Concluding remarks

The territory at the disposal of U.S. and Great Britain at the end of the nineteenth century comprised an expanse of land of twenty-eight million square kilometers—a territory almost the size of Africa. The supposedly unexploited ecosystems that these lands included fed the growing industries of both countries and stimulated the development of international capitalism. As pre-colonial populations were pushed away, those territories and their natural resources were now either privatized or susceptible to private appropriation. The exploitation of these continental masses and the economic fluxes created between colony and metropolis were the cornerstone of two of the most powerful empires the world has ever seen. The other side of the coin was tremendous human suffering and ecological destruction.

Around the mid-nineteenth century, the massive process of settlement of vast natural frontiers in North America and Australia had no historical precedent. The speed and breadth of that process seemed

\textsuperscript{210} Ibid., §99 120, Book III Title III §1061 423.
\textsuperscript{211} Ibid., Book I Title II §99 120.
\textsuperscript{212} Ibid., Book III Title III §1059 423.
\textsuperscript{213} Ibid., §1087 and §1088 431.
\textsuperscript{214} Ibid., §1095 433.
\textsuperscript{215} Ibid., Book III Title III §1061 423.
impossible to replicate, and the times of big land acquisitions were coming to an end. As the jurists of the period recognized, there were few lands in the world unknown to the Europeans. Where else could Western imperialism extend its tentacles? Where could it gain easy access to natural resources that the increasing process of industrialization in Western countries demanded?

Against all odds, Western imperialism had yet to deliver its final blow. At the close of the century, a land grab of equally gigantic proportions took place. Another thirty million square kilometers fell into European hands in the final decades of the nineteenth century. According to European perceptions, a whole new unoccupied continent awaited to be efficient and beneficial exploitation. But the occupation of Africa posed a completely different set of legal challenges to that of continents inhabited by savages: the barbarian African could not be treated the same way as the savage. Besides, its tropical lands were not suitable for the kind of economic ventures that were typical of settler societies. How could Africa be legally appropriated? Was the standard of environmental exploitation useful for African colonization? Could Africans and the tropics be civilized?

International jurists at the end of the century tried to provide an answer to these questions. The rationale of African colonization was not the exploitation of vacant natural resources, but the creation of sovereign states in a political vacuum—or, rather, a backward political space. But the cosmopolitan impulse to transform nature did not completely fade away. As industrialization demanded more and more raw materials, most international lawyers recognized that Western nations, as they had done in other continents, ought to improve African natural habitats. Industrious activity was inherently associated with the white race. But how could this mission be reconciled with the fact that Africans were acknowledged as owners of their lands?

Despite the fact that the importance of exploiting African natural wealth was recognized in international legal texts, there were conceptual obstacles to the materialization of this idea. Because Africans were not savages, stadial theory and the agricultural argument no longer served as legitimizing rationales of colonization. How, then, could Europeans reap the benefits of exploiting the tropics without violating the property rights of Africans to the territories they occupied? How was the exploitation of Africa organized in practice and legalized in theory? As stadial theory receded, losing its explanatory character, the idea of civilization was in need of a new vernacular that could better capture how progress operated at the end of the century, and explain how colonial nature ought to be civilized. The following chapter will explain the way in which the idea of evolution, and particularly legal evolution, provided a response to these various challenges.
Nature and mankind interact on one another. Nations and races derive their characteristics largely from their surroundings, but, on the other hand, man reclaims, disciplines and trains Nature. The surface of Europe, Asia and North America has submitted to this influence and discipline, but it still has to be applied to large parts of South America and Africa. Marches must be drained, forests skilfully thinned, rivers be taught to run in ordered courses and not to afflict the land with draught and flood at their caprice; a way must be made across deserts and jungles, war must be waged against fevers and other diseases whose physical causes are now mostly known. A good beginning had been made and the future is full of hope.¹

During the last decades of the nineteenth century most international lawyers concluded that the period in which Europeans had ‘discovered’ new appropriable territories inhabited by savages was over. A new epoch in Western expansion was inaugurated with the march of European adventurers, companies, and nations from coastal areas into the interior of African. The colonization and partition of Africa took place under a rather different set of circumstances than settler colonialism. In this context, stadial theory and the standard of environmental exploitation lost a great deal of its power. It was generally agreed that, even though African methods to till the land were rudimentary, Africans were mainly agriculturalists. They definitely had a notion of private property. Besides, Africa was densely populated, especially West Africa. For all these reasons, Europeans could not easily displace Africans and seize their natural resources.

In response to the change of colonial scenario, occupation shifted in Africa from the appropriation of land to the occupation of sovereignty. For Europeans, African political communities did not meet the standard that gave them the status of sovereign nations. They did not exercise full sovereignty, at least not in the way that international law demanded for full recognition as international independent actors.

Consequently, Africans needed European intervention to help them gain the capacity to govern themselves.

The demise of stadial theory, the shift of occupation from property to sovereignty, the importance of sovereignty and statehood as the standard that gave access to the civilized community of nations: all these factors seemed to indicate that the exploitation of nature was no longer a valid rationale for colonization. However, international lawyers still clung to the cosmopolitan conviction that modern nations had a mandate to develop the world’s unexploited resources. As we shall see in this chapter, even as late as the second decade of the twentieth century Lord Lugard, writing about the British motivation for the colonization of Africa, declared the tropics the heritage of mankind. Their exploitation was the progressive mission of modern nations. At the same time, and perhaps more than ever, the great international expansion of the capitalist economy demanded the continuing flow of raw materials from the colonies for the production of all kinds of consumable items.

Parallel to this development, international law also suffered a crisis. This is paradoxical, taking into account that, as Koskenniemi has demonstrated, international law was actually born as a specific project, through the efforts of the Institut de droit international, during the last decades of the nineteenth century. Factors such as the expansion of trade, the threat of war, and colonial competition pointed toward the need for a science that could regulate and make manageable all the activities that states had started to undertake with increasing vigor and frequency on the international plane. The world was increasingly knitted together, and international law seemed to be the right language to articulate that union. But precisely at the time that its guidance was most needed, international law lost two of its most powerful sources of normative power: Christianity and natural law. So, international law was in need of an extra juridical yardstick in which to anchor its transformative capacity.

In this chapter, I will explain how the idea of evolution filled the need for a new model of colonization while at the same time helping international law gain stature, force, and respectability. I will specially focus on the writings of Henry Maine for a number of reasons. First, Maine popularized the idea of legal evolution. In so doing, he found a new and modern vernacular that gave flesh to the old idea of civilization, reestablishing a solid intellectual foundation for progress and Western superiority. Importantly, in so doing, he did not move completely away from the importance of material factors as drivers of historical development and social change. In fact, for Maine, evolution took place when the law was able to accommodate technological, productive, and material innovations. Second, Maine

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2 See infra page 463.
defined the state as power over a specific portion of the Earth. Statehood was related to government. But in turn government meant, among other thing, the establishment of a space for private relations over matter. In other words, states regulated how a collectivity could use and exploit the ecosystems within a particular geographical area. Finally, the writings of Maine informed the way in which the British organized the administration of their colonies. As we will see, in 1922 Lord Lugard adopted and adapted Maine’s guidelines to the imperial government of Africa. In so doing, both Lugard and Maine provided an answer to the question of how to exploit resources that in principle belonged exclusively to African peoples. Even though not the main focus of Maine’s theories, the exploitation of nature indirectly informed his theories.

But perhaps more important than all these aspects was Maine’s contribution to recreating in a modern fashion the narrative of progressive social development, an idea with old pedigree in Western intellectual history. The move from primitiveness toward modernity was for Maine the process of individual disaggregation from the collectivity, which he aptly captured in his famous maxim ‘from status to contract’. The progressiveness that according to Maine was inherent to individualism, and particularly economic individualism, reified anew Western private rights. So Maine’s theories provided theoretical ammunition to continue the exploitation of non-European nature.

For Maine and contemporary legal commentators, the rights that allowed the appropriation of nature were the ideal institutional apparatus to engender progress. As in stadial theory, individual property rights and the marketization of social relations were proclaimed as the means to hit the highest point that societies could reach. Reassured at the top of the social pyramid sat the Western homo economicus, an individual that could reap the fruits of the modern materialization of an old Western aspiration: human reign over nature.

*Henry Maine and legal evolution*

Henry Maine was born in 1822. His early years were not particularly happy, a circumstance to which the separation of his parents certainly did not help. His tendency toward illness and a delicate nature contributed to his introverted character. At age 18 he went to Cambridge, as an Exhibitioner of Pembroke

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4 Ibid.
College, to follow his studies. He was a distinguished student with a sharp mind. His intellectual merits won him a Chancellor’s medal for English verse and membership in an elite secret society at Cambridge called the Apostles. After studying law for a few years, he was appointed to the Regius Professorship of Civil Law at the early age of twenty-five. After some years he became Reader in Roman Law and Jurisprudence at the Inns of Court in 1852. The knowledge of classic legal systems that he acquired during his academic career was to have great importance for his later theories on law and society.

Maine was also interested in journalism. He wrote several pieces for the Monday Chronicle and was one of the founders of the periodical The Saturday Review. A convinced conservative, Maine favored aristocratic government and distrusted democracy, advocating against the extension of suffrage. In 1861 he published Ancient Law, a book that became popular soon after its publication and which eventually acquired the status as a classic text. A year later, in 1862, he moved to India, where he acted as a legal member of the Governor-General’s council, where he advised on legal and political matters. Back in England in 1869 he became Corpus Professor of Jurisprudence at Oxford, and almost two decades later he took up the Whewell Professorship of International Law at Cambridge. During those years he published the bulk of his work. In 1871 came Village Communities of East and West; soon followed The Early History of Institutions published in 1875. His next book, Dissertation on Early Law and Customs, which focused on the early Irish Brehon laws, was published in 1883. These were the books in which Maine deepened and extended some of the main views contained in Ancient Law, which, despite criticism, remained almost unaltered until the end of his life. The lectures he imparted as Professor of International Law were published postmortem under the title International Law. He died in 1888, leaving behind his wife and cousin Jane Maine and two sons.

Maine had an interest in jurisprudence and legal history. His historical approach to the study of legal and social change was an important contribution to the development of sociology, creating a bond between law, history, and anthropology. Maine presented his work as a scientific endeavor: he

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5 Ibid.
7 Burrow, Evolution, 139.
8 Ibid.
9 Kuper, The Reinvention, 39.
wrapped in a scientific guise his object of study, famously drawing a comparison between the function that rudimentary early forms of legal ideas had for the jurist and that which the ‘primary crusts of the earth’ played in the inquiry of a geologist. The movement from ancient to modern society could be study with rigor, precision, and objectivity. This scientific outlook, together with Maine’s confident tone in Ancient Law, explains the authoritative force of his work.

Maine was particularly influenced by comparative philology and the German historical method. The greatest discovery within the discipline of comparative philology was the existence of an Indo-European or Aryan language family. The revolutionary restructuring of the ethnic affiliation of the peoples of the world that followed the emergence of an Aryan group influenced Maine’s research agenda, placing India squarely at the center of it.

Like other intellectuals interested in the laws of social change, he believed in a timeline that linked humanity’s primitive past with its modern present. Following former theories of social change, namely stadial theory, he was able to identify traditional communities contemporary to his own society that reproduced many of the ancient traits of modern nations. Contemporary backwardness was a mirror of the past of progress. As he put it: ‘the primitive condition of the progressive societies is best ascertained from the observable condition of those who are non-progressive.’ India was one of the examples where one could contemplate the past of civilized nations. India had a double temporality, being simultaneously past and present. As Maine noted, ‘the British rulers of India are like men bound to make their watches keep true time in two longitudes at once’.

Due to India’s particularity, its scientific observation could provide invaluable data for reconstructing the general and progressive movement of human communities.

Despite Maine’s conviction about the neutrality and objectivity that the scientific method conferred to his theories, it is possible to identify a specific political agenda running through his work. Maine was a conservative, and hence he praised order and was averse to change. He especially feared and distrusted transformations of a revolutionary nature. So, for example, he characterized the French Revolution,
which attempted to attain equality, as full of gross ‘disappointments’.

Maine believed that ‘human nature’ was stable: traits of older generations were passed to the new ones, assuring continuity. Stability rather than change was the predominant condition of human beings. Life had a good degree of repetition, harmony, and continuity.

It was the general lack of variance that created the possibility for scientific inquiry into the laws of change. Constant change presented a great challenge to the predictability of human conduct. Conversely, a good degree of permanence allowed an unbiased scientific observer (this is how Maine saw himself) to discern, spot, and analyze social phenomena and social change. He was convinced that ‘… the stable part of our mental, moral and physical constitution is the largest part of it, and the resistance it opposes to change is such that … the variations of human society … are neither so rapid nor so extensive that their amount, character, and general direction cannot be ascertained.’

Maine’s conservatism did not translate into immobilism. To a certain extent, he was a progressive thinker. He valued Bentham’s principle of happiness for the greatest number of people as a guide to police and institutional reform. At the same time, he thought that the pace of conscious social change through legislation that Bentham recommended was too hasty. One of the main goals of Maine’s historical analysis was to demonstrate the steady and gradual evolution of human institutions. In this sense, his analysis contributed to a shift in imperial administration as it demonstrated that societies carried within themselves the seeds of their own change. This meant that any attempt to speed up the process of social transformation at a rate faster than the institutions of ancient societies could absorb it ran the risk of creating the contrary effect. Revolutionary change shocked the very foundations of primitive societies, leading straightforwardly toward disorder and anarchy. This was a conclusion of great relevance for those worried about the stability of the British Empire. It was also an assumption that guided imperial administration at the end of the nineteenth century.

In his various works Maine provided an account of the development of laws related to their historical context. In doing so, he distanced himself from analytical jurists such as Bentham and Austin. He recognized and appreciated the scientific character of their systems of jurisprudence, but criticized the
abstraction of their deductive approach.\footnote{Maine, \textit{Lectures}, Lecture XII 343.} Asserting that law was a command of the law-giver followed by the threat of a sanction left more questions unanswered than answered.\footnote{Maine, \textit{Ancient Law}, Ch I 7, Ch V 118-119.} The shortcoming that vitiated both Bentham and Austin’s speculations on law was that neither of them had taken stock of law as it existed in ancient periods of human history.\footnote{Ibid., Ch V 118-119.} They based their conclusions on an appraisal of the laws and institutions of their own time and older periods that they were fond of.\footnote{Ibid., 119.} But they failed to go further back in time and broaden their horizons. Maine was convinced that, when trying to understand the interrelationship of law and society, one ought to start with the ‘simplest social forms’ in as ‘rudimentary’ a ‘condition’ as possible.\footnote{Ibid.} Instead of deductive theorizing, Maine advocated an inductive analysis of historic and ethnographic evidences.

A second group of authors with whom Maine parted ways, and one he was more critical of, comprised scholars from different generations who had explained the origin of civil society by reference to a hypothetical natural state in which humanity dwelt. This set of authors encompassed renowned thinkers such as Grotius, Burlamaqui, Blackstone, Locke, and—perhaps its more representative advocate—Hobbes.\footnote{Ibid., 113-114.} The great mistake of this tradition had been to adopt as a point of departure for their speculations a ‘non-historic’ and, thus, ‘natural’ human condition.\footnote{Maine recognized the ‘political serviceability of the theory’. See Ibid., Ch IX 309.} By imagining a conjectural vacuum or state of nature from which humans had moved into political communities through compact, those authors had managed to create a self-fulfilling prophecy.\footnote{Ibid., Ch IV 91.} Due to the rationalist and deductive nature of their speculations, they were able to project into the original state of humanity the very circumstances that justified the transformation of that condition.

Instead of starting his analysis from his own society or from an abstract hypothetical human condition, Maine set upon his shoulders the intellectual task of producing a theory and explanation of social change based on the concrete first historical vestiges of human law and society. In his enquiry, he painted an image of primitive societies rather different from that of stadial theory. Without explicitly referring to authors that wrote within that tradition, he lamented that previous historians had often projected onto primitive humans the very features of their own contemporaries.\footnote{Ibid., Ch IV 110-111, Ch VIII 254.} There were fundamental differences
between Maine’s ideas and previous accounts of social advancement. Mill, for instance, had given an individualist account of savagery: for him, one of the main traits that set savages apart from civilized individuals was their incapacity to cooperate and come together with their fellow beings for the good of the whole society. Maine inverted Mill’s logic, arguing that primitive humans lived constrained in tightly communal patriarchal groups.

He explained the ‘primeval condition of the human race’ by reference to what he termed the Patriarchal Theory. Accordingly, humans lived as part of family groups, in which they were under the absolute authority of a common father—as Maine vividly put it, ‘law is the parent’s world’. For Maine, the progressive move toward civilization did not stem from an individual’s ability to cooperate and integrate into wider social groups but actually from the contrary movement of individual liberation from the bonds of communal obligation under which humanity had spent most of its primitive history. Far from idealizing the original human condition, Maine believed that in remote ages humans lived most of their life subjected to ‘patriarchal despotism’ and, as a result, their actions were controlled by a regime of ‘caprice’ instead of law. This was a suffocating world, one that precluded individual enterprise, hindered creativity, and limited individual achievement.

Ancient society was not an aggregation of individuals but a collection of families. This was the single most important trait, one from which ancient law derived most of its other characteristics. Law in primitive societies was minimal in quantity, ritualistic in form, and stationary. As the evolutionary logic of history engendered social progress, the individual eventually emerged as the source of rights and obligations. Modern society was characterized by the dissolution of the reciprocal rights and duties of families and their substitution with legal relations that stemmed from ‘the free agreement of individuals’. Maine used the term ‘status’ to refer to these ancient customs based on personal ties. In a legal sense, he described the progressive move from traditional to modern society through his famous maxim ‘from Status to Contract’.

Maine considered codification as a central process for understanding the relationship between legal evolution and social progress. The opening sentence of Ancient Law is revealing. Referring to Roman

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33 Ibid., Ch V 122. He defined the patriarchal family with great clarity in Henry Summer Maine, Village-Communities in the East and West (London, J. Murray, 1871) Lecture I 15.
34 Ibid., Maine, Ancient Law, Ch V 125.
35 Ibid., Ch I 8. See also Maine, Lectures, Lecture X III 393.
36 Ibid., Ancient Law, Ch V 126.
37 Ibid.
38 Ibid., 169.
39 Ibid., 170, (italics and capitals in the original).
law as ‘the most celebrated system of jurisprudence known to the world’, Maine contended that it ‘begins, as it ends, with a Code’.\(^{40}\) Civilized nations had similar codes.\(^{41}\) For Maine, codes were of utmost importance. They were the type of law that created the possibility of social progress. But before codification was even possible in a given society, that society had to undertake a series of prior steps in its legal evolution, steps that were tied to political change.

Maine affirmed that in the ‘infancy of mankind’ law was first mere habit; then supernatural judgments or ‘Themistes’ (the Greek expression for what Maine considered as awards divinely dictated to the judge), which were closer to commands than to law; and finally custom.\(^{42}\) Habits and ‘Themistes’ issued by a powerful King constituted the beginning of the history of jurisprudence. A second phase started with the weakening of the connection between the monarch and the divinity.\(^{43}\) The decay of monarchical power left the door open for the emergence of powerful aristocracies.\(^{44}\) Aristocracies took power in both the West and the East at different historical times but at the same stage of civilization.\(^{45}\) But despite this similarity, events unfolded differently in those regions. Whereas in the East a religious aristocracy directly placed under the King managed to displace political and military aristocracies, in the West it was the latter that prevailed.\(^{46}\)

The epoch of aristocracies was also the time of customs. Aristocracies were the ‘depositaries and administrators of law’.\(^{47}\) Even though the divine origin of rules persisted, concrete disputes between members of the community were not resolved by reference to a sacred command. Instead, the juridical aristocracy started to claim authority as interpreters of the laws.\(^{48}\) In time, this knowledge became custom. As a result, before the invention of writing the aristocratic judicial class was the guardian and living repository of the customs of the tribe or race.\(^{49}\) This was the era of customary law, and from it the history of jurisprudence moved to the next stage: the ‘era of Codes’.\(^{50}\)

The discovery of writing allowed the inscription of usages in codes. The abuse of power by aristocracies may have played a role in bolstering popular demands for codes, but the invention of writing

\(^{40}\) Ibid., Ch I 1.
\(^{41}\) Ibid., 2.
\(^{42}\) Ibid., 4-8.
\(^{43}\) Ibid., 10.
\(^{44}\) Ibid.
\(^{45}\) Ibid., 11.
\(^{46}\) Ibid.
\(^{47}\) Ibid., 12.
\(^{48}\) Ibid.
\(^{49}\) Ibid.
\(^{50}\) Ibid., 14.
was the definite springboard for reform. In general, codes were of great value for ancient societies. But the fundamental question—one that was crucial for social advance—was the stage of social progress at which the laws of a particular society were registered. In the case of Rome, laws were codified at the right moment. By contrast, in India, they were written too late, after irrational superstition had already found a way into the legal system.

In the early times of human societies, legal evolution was the result of archaic feelings and backward intellectual ideas rather than explicit will. However, in the era of codes legal change was guided by a conscious effort to attain social improvement. For Maine, there were two types of codification that corresponded to two different kinds of societies: ‘stationary’ and ‘progressive’. Whereas in the East once social usages had been recorded in codes societies became stagnant, in the West there was a continuous improvement of the legal system in order to bring it into conformity with advances in the social sphere.

This was the crux of the relationship between social evolution and legal change. The improvement of material civilization everywhere in the world demanded new rules that, in turn, created the conditions for further improvement. Codification was not only vital for legal progress, but also for material and social amelioration. The incapacity to bring about a complementary positive interconnection between improving social activities and suitable laws was the cause of all the evils that afflicted primitive societies. India was again the perfect example of a stagnant society in which instead of material civilization ‘expanding the law, the law’ had limited ‘civilization’. The main problem in India was the fusion between law and religious ideas. Here Maine came close to James Mill, who had previously identified and denounced India’s main social drawback. Religious superstition and the power of priests were stumbling blocks toward civilization and the main reasons for the enslavement of Hindu society. Maine explained the stagnation of the greater part of humanity in a similar vein. Even though he did not mention India explicitly, it was clear that it was included in that part of humanity:

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51 Ibid., 15.
52 Ibid., 16.
53 Ibid., 20.
54 Ibid.
55 Ibid., Ch II 21.
56 Ibid.
57 Ibid., 22. See also Mantena, Alibis of Empire, 102.
58 Ibid., 22-23.
59 Ibid., 23.
60 Mill, The History, Vol II Bk II Ch X 167.
The rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form.\textsuperscript{61}

Maine conferred an important role in the social evolution of what he called ‘progressive societies’\textsuperscript{62} to the material aspect of those societies. He affirmed without hesitation that in an advanced stage of progress social wants as well as social sentiments preceded rather than followed the law.\textsuperscript{63} Law, he stated, was ‘stable’, but the societies he was referring to were ‘progressive’.\textsuperscript{64} In those types of societies, new social needs created a tension with old legal codes. As they progressed, a gap between the two was created. And, he continued, in an illuminating passage in which he identified the basic law of social progress: ‘The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.’\textsuperscript{65} The correlation between material improvement and legal change as the underlying logic of human progress applied to primitive communities as well. The customs of primitive communities were normally in tune with their social needs. Therefore, they tended to procure the welfare of the whole society.\textsuperscript{66} Those rules, Maine contended, ought to be preserved until new ‘social wants’ created new material conditions.\textsuperscript{67}

It is in light of this conclusion that the history of Roman law was of particular relevance for the explanatory character of Maine’s theory. Rome was the best historical example of a society in which social development and legal change had proceeded hand in hand, producing as a result a civilization that had, ever since its fall, received nothing but the highest admiration from European intellectuals. The progressive modification of Roman law enabled a virtuous cycle of improvement at a historical time in which the rest of humanity had stagnated.\textsuperscript{68}

But the simple scheme in which legislation was a mere positive ally of social improvement was complicated by the fact that it could also be the worst instrument in the destabilization and disintegration of the social order. How was that possible? Maine believed that there was a contrary problem of legislation coming too late to help effect social change: it coming too soon.\textsuperscript{69} When law developed more

\begin{flushleft}
\textsuperscript{61} Maine, \textit{Ancient Law}, Ch IV 77.
\textsuperscript{62} Ibid., Ch II 22.
\textsuperscript{63} Ibid., 24.
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid., 19.
\textsuperscript{67} Ibid.
\textsuperscript{68} Ibid., 24.
\textsuperscript{69} Ibid., Ch IV 74-75.
\end{flushleft}
rapidly than the pace at which the social institutions of a particular society evolved and when the rule of law was relaxed for the sake of justice, as was the case with ‘the more progressive Greek communities’, the authority of the rule of law was undermined, as was the institutional stability that steady and continued progress required.70 Here again Maine trod the delicate line between the necessity of legal change as an instrument of progress and the dangers of its prematurity. All in all, the contribution of legal change to social progress both highlighted and testified to the evolutionary logic of history.

Another major piece in the historical puzzle that Maine attempted to elucidate in Ancient Law was the emergence of private property. As in other areas of analysis, Maine started his exposition on the subject by exposing the pitfalls of a conjectural theory of the origin of property based on occupation as a natural mode of acquisition. According to the Roman law ferae bestiae, things that were vacant or ‘res nullius’71 became the property of the first who took possession of them with the intention of making them her or his own.72 The merit of this institution was beyond question. It was adopted, for instance, as part of the law of nations, becoming the source of regulation for the original acquisition of territory in the continents colonized by Europeans.73

In addition to its service to European world expansion, occupation had also served speculative jurisprudence in explaining how private property had historically originated. According to natural lawyers, at the dawn of humankind the Earth belonged to the whole human family. Humanity enjoyed nature and its fruits as a whole without individualizing any part of it. Everyone used natural products at their convenience, and that use created a temporary right of possession that ended as soon as utilization finished.74 As Blackstone had declared, when humans first trod the Earth everything was res nullius.75 According to Blackstone, as the world population grew, the need of subsistence made it expedient to appropriate not only the use of things but also their very substance.76 For Maine, this hypothesis left unexplained the reason why the somebody’s new property automatically enjoyed the respect of all other members of society.77

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70 Ibid. See also Mantena, Alibis of Empire, 102.
71 Maine used the Roman term in Ancient Law, Ch VIII 245 and 251.
72 Ibid.
73 Maine, International Law, Lecture IV 70-74.
74 Here Maine used Blackstone’s Commentaries on the Laws of England as an example of the theory of occupation applied to the origin of property. Maine, Ancient Law, Ch VIII 251-252.
75 Ibid., 251.
76 Blackstone, Commentaries, Bk II Ch I 4, as quoted in Maine, Ancient Law, Ch VIII 252.
77 Ibid., 253-257.
As with other theories that started with *a priori* ideas from which they derived the emergence of political or legal institutions (private property in this case), the main shortcoming of the theory of occupation was its lack of historical context. By presupposing a primitive state of humanity where everything was unappropriated, authors like Blackstone had painted a picture of the past that was in stark contrast to what for Maine was the real scenario. Maine actually argued that the right to occupy vacant things characterized advanced societies rather than traditional ones. Only in those states of society in which everything was supposed to have an owner did mere possession of unoccupied things create a legal entitlement to ownership. It was logical that only a good deal of familiarity with the institution of private property together with the belief that everything was someone’s property could account for the fact that occupation automatically created individual property rights.

Maine mobilized his ethnographic knowledge of ancient societies to buttress his critique of the way in which intellectuals had traditionally understood the operation of occupation in primitive societies. As he had previously stated in his book, ancient society was composed of families rather than individuals. Therefore, the law of persons and the law of things were intertwined in early times. In other words, the family held everything in common. The first human societies were not familiar with the institution of private property. The best way to demonstrate this hypothesis was to look at the foremost living example of an archaic society: India. In India, the Village Community was a patriarchal organization and, at the same time, an ‘assemblage of co-proprietors’. This model was so important because of its endurance despite the revolutions and upheavals experienced by the whole society. Finally, it was also a society in miniature, with its own system of government, justice, and police.

Maine believed that finding the detailed reasons for the evolution from common to private ownership was a hard task because the conditions in which that capital transformation had occurred remained utterly obscure. He was sure, nonetheless, that the process of alteration of the nature of ownership was linked to the process of the family expanding into tribes, then the dissolution of the tribe or group of kinsmen into separate households, and finally those households being replaced by the individual. In ancient times in the Aryan and Semitic groups the family, the house, the tribe, and the state were linked by a

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78 Ibid., 256-257.
79 Ibid.
80 Ibid., 260.
81 Ibid.
82 Ibid.
83 Ibid., 262. See also Maine, *Village-Communities*, Lecture VI 175.
85 Ibid.
relationship of consanguinity. This relationship was often a fiction as people outside the blood-group were admitted as insiders. Still, the presumption was that these outsiders eventually became assimilated and hence were part of the common lineage. Landed property, situated at the top of the pyramid of privatization, appeared when this system of consanguinity crumbled and was substituted by a direct attachment to the land.

When tribal communities settled down in particular territories, sovereignty started to shift slowly from an ancient personal character to a modern territorial one. Only a few societies had completed that vital transfiguration, namely those ‘portions of mankind destined to civilization’. This process took a long time, but soon land rather than kingship consolidated as the center of social and political organization. Even ancient great empires had consisted of an aggregation of smaller units glued together by relations of consanguinity.

Significantly, this political process affected not only commonwealths but also the smaller social units of the Aryan group: village-communities. Whereas commonwealths previously united by consanguinity evolved into countries with territorial sovereignty, village-communities gave rise to modern notions of landed-property. Village communities in India were first united by blood relations. Land, being a mere source of provision, was accessory to political power. But two important changes altered this state of affairs. There was, first, an endogenous progressive movement of dissolution of family ties whereby the village-community was assembled solely by its members’ relationship to the land. At this stage, there was still a perfect regime of communal ownership, but this regime did not foreclose the enjoyment of private property over movable goods and cattle. Later on, there was a slow dissolution of the Village-Community from a common stock to an aggregation of separate families living in separate dwellings. The land was no longer hold in common by the whole village. While arable lands were divided between the various households, wasteland remained common. From that stage there were only a few steps to the ‘disentanglement of the separate rights of individuals from the blended rights of

86 Maine, Lectures, Lecture III, 64-66. Maine extended the rule of consanguinity to the Uralian, Turks, Hungarians and Finns. See also Maine, Ancient Law, Ch V 129.
87 Ibid., 129-130.
88 Ibid., 129-131.
89 This process is described in Maine, Lectures, Lecture III, 70-73. See also, Maine, International Law, Lecture III 56-57.
90 Maine, Lectures, Lecture III 70. See also Maine, Ancient Law, Ch IV 103.
91 Maine, Lectures, Lecture XIII 386-387.
92 Ibid., Lecture III 73.
93 Ibid., 77.
94 Ibid., 80-81.
95 Ibid., 81.
96 Ibid.
a community’ and the apparition of private property over land. Maine left the reasons for this last change unexplained, conceding that they were unclear.

The emergence of landed property in Indian village-communities and European societies did not follow the same path. After the dissolution of the Roman Empire, barbarian invasions brought with them many of the features of organization that were typical of ancient communities. But once settled in Western Europe, the tribe’s ties started to disintegrate in a process later called feudalization. This process was bolstered by the extension and concentration of power and authority in the figure of the chief. From the study of India and Ireland, Maine theorized an autochthonous—albeit different—process of decomposition of the village-community in the East and the West. The reasons for the dissolution of tribe’s ties in Ireland were, in general, applicable to the whole Europe. What were those reasons?

It is surprising to say the least that it was an animal, the ox, that was the central figure in the narrative of change. In ancient societies oxen were highly valuable as objects of exchange but, more importantly in an agricultural era, as instruments of tillage. Chiefs were the biggest owners of cattle, probably due to their superior military status. Whereas the chiefs needed lands in which their cattle could feed, the tribesmen needed oxen to till their lands. The need of the tribesmen gave the chief an advantage that eventually allowed him to amass a kind of feudalistic power over his subjects, but also over free tribesmen to whom he formerly was a mere ‘primus inter pares’ (first among equals). It was through this practice of receiving stock from the chief and performing in exchange a service in the form of manual labor that tribesmen became vassals of the chief. Importantly, this feudal system contributed to the dismantling of the ancient tribal and family group. This was so because the persons from whom tribesmen took stock were often not the chiefs of their own tribe. Due to this novel association the groups formed by lords and vassals superseded the old unit of chief and tribesmen.

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97 Ibid., *Ancient Law*, Ch VIII 269-270.
98 Ibid., *Lectures*, Lecture III 82.
99 Ibid., Lecture IV 115.
100 Mantena, *Alibis of Empire*, 135.
102 Maine explained the importance of oxen in the past with reference to the etymology of the words ‘chattel’ and ‘capital’. See Ibid., Lecture VI 147-148.
103 Ibid., Lecture VI 149.
104 Ibid., 151.
105 Ibid., 152.
106 Ibid.
107 Ibid., 158.
108 Ibid., 164.
109 Ibid., 164-165.
When blood ties were completely severed, the conditions were ripe for further changes toward a society of individuals linked by territorial sovereignty. The dissolution of the feudal group was the final step leading to the advanced European societies that were contemporary for Maine. Maine refrained from trying to explain this final change, arguing—not without reason—that this task amounted to rewriting the modern political, economic, and social history of Europe. This notwithstanding, Maine enumerated the greatest achievements engendered by the transition from feudal to modern society: modern state sovereignty over the population of a particular territory, an understanding of land as an exchangeable commodity, and the growth of legislation oriented toward human happiness.

This political process of the individualization of property was concomitant to a legal process of alienability whereby social goods were transformed into merchantable commodities. In ancient societies it was not rare for the group to exchange certain things with one another. In consequence, they separated a part of the common patrimony and gave it away in return for a useful item. Importantly, Maine noted that this phenomenon was not universal. Among Sclavonians, for instance, it was forbidden to alienate the belongings of the family. But as soon as the material conditions of life started to improve and there was an increase in ‘activity’, the need to exchange items became pressing. The satisfaction of this need found the obstacle that in ancient societies the transmission of goods was riddled with innumerable formalities and burdensome solemnity.

The universal idea of distinguishing between different types of goods emerged as a solution to this conundrum. Early societies differentiated lower things that could be objects of transaction without the intricateness required for things imbued with special dignity and importance. Here again Maine used Roman law as an example, invoking the Roman division between res mancipi (things that needed a formal act of mancipatio to be exchanged) and res nec mancipi (things the transmission of which did not require the full ceremony of mancipatio) to substantiate his point. This way of dividing goods sometimes coincided—but often did not—with the division between movables and immovables. The differentiation between movable and immovable goods did not necessarily correspond to one between inferior and

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110 Ibid., Lecture III, 86.
111 Ibid.
112 Ibid., 86-87.
113 Maine, Ancient Law, Ch VIII 271.
114 Ibid.
115 Ibid., 272.
116 Ibid.
117 Ibid.
118 Ibid., 272-273.
superior things. However, the latter distinction applied respectively to *res nec mancipi* and *res nec mancipi*.\textsuperscript{119} The Romans categorized as *res mancipi* items that had a great value for the community, mixing together moveables and immovables such as land, slaves, horses, and oxen.\textsuperscript{120}

As economic life became more complex, or, as Maine put it, when ‘the wheels of society had begun to move quickly’, societies felt the convenience of simplifying the requirements to sell and buy property.\textsuperscript{121} In progressive societies, new material goods constantly appeared thanks to the development of the arts and science. Everything that was newly produced was then classified as *res nec mancipi*.\textsuperscript{122} These new articles of trade were valuable things, so in time the old difference between superior and inferior items and their way of transfer became diluted. Eventually land was also commercialized, integrating the ranks of commodities whose value was derived from the market.

Maine’s theory of property provided an explanation of the origin of private property. Unlike previous doctrines, Maine’s findings were based on a scientific reconstruction of ethnographic data. One of the main conclusions of this investigation was that in traditional societies property was common. From a methodological standpoint, the historicist explanation of the transition from common to private property provided a well-grounded and scientifically authoritative narrative. The supposed objectivity of his research also had a political effect. His theory of private property resonated with debates that were contemporary to Maine’s society. There were rival interpretations of the origins and nature of property, as well as of its social and political ramifications. The opening lines of the *Communist Manifesto* made clear that the specter of communism was a force to be reckoned with.\textsuperscript{123} In addition, the function of communal property in traditional cultivating communities was also associated with popular democratic theories.\textsuperscript{124}

Maine’s conclusions about the origin and development of private property scientifically shielded it from ideological attack. He linked private property with progressive societies on the one hand and communal property with non-progressive ones on the other.\textsuperscript{125} By doing so, he managed to move the

\textsuperscript{119} Ibid., 274.
\textsuperscript{120} Ibid., 274, 277. See also Maine, Lectures, Lecture VI, 148.
\textsuperscript{121} Maine, *Ancient Law*, Ch VIII 273-282.
\textsuperscript{122} Ibid., 278.
\textsuperscript{124} Maine, Lectures, Lecture III, 88.
\textsuperscript{125} It is interesting that Maine tried to hide his political agenda behind his scientism. In a revealing passage he took issue with Communism (without explicitly mentioning to it) and, at the same time, claimed that his association of private land property and modernity was just a scientific fact that did not imply any political valuation of particular institutional arrangements. To make things even murkier, he added: ‘nobody is at liberty to attack several property and to say at the same time that he values civilization’. Maine, *The Effects*, 30.
debate away from the ideological battleground to a scientific terrain in which his authoritative use of the past strengthened his position and political agenda. What is more, Maine’s scientific scrutiny of history proved that private property and social progress were interwoven, and hence the substitution of private by communal property could inhibit social improvement in Great Britain and other advanced European societies. As a result, his theories cemented the high reputation of private property as a vehicle for progress.

The new face of civilization: A shifting progressive narrative?

Maine’s theory of legal evolution was a watershed in attempts to provide a historical explanation of progress. The attention to detail with which Maine reconstructed ancient society and his innovative theories made him a pioneer of and an inspiration for the new sciences of sociology and anthropology. Many of his postulations were attacked and discredited by later anthropologists. Still, part of Maine’s impact stemmed from the fact that he created an original account of progress that broke with standard explanations of this phenomenon based on material forces, which were characteristic of the progressive philosophy of history cultivated by the Scottish Enlightenment. Conjectural historians postulated that the engine of social advancement was the improvement of the mode of production that a society used to procure its subsistence. The intensification of the productive forces whereby societies used their natural resources and transformed their surroundings was also factored as an explanation for political and legal changes within those societies. Accordingly, for instance, the origin of the institution of private property was deemed to have sprung from the change from pastoralism to agriculture.

For Maine, legal change was not epiphenomenal to economic or social transformations. Likewise, legal institutions were neither the mere façade of particular economic arrangements nor, as Marx famously put it, part of the superstructure of society. In moving away from a material explanation of history, Maine conceived the development of jurisprudence as governed by its own laws of change. But those laws could not be grasped in the abstract. In order to flesh out their implications, one ought to look at the regularities of the past registered in ethnographic data, or to contemporary primitive societies that reproduced the features of ancient ones.

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126 This happened, for example, with his theory patriarchal theory. See Kuper, The Reinvention, 54-58.
127 Mantena, Alibis of Empire, 59.
Another crucial point that demarcated Maine’s theories from those of conjectural scholars was that Maine reduced the four states of society advocated by stadialism to a binary opposition between modern and traditional societies. Moreover, even if he used terms such as ‘savage’ and ‘barbarian’ that were commonly associated with stadial theory, they were often devoid of the ‘historical and sociological specificity’ that those terms had in the former model. However, in spite of the obvious divergences that existed between the philosophy of history characteristic of the Scottish Enlightenment and that of Henry Maine, I believed that Maine’s ideas were closer to authors such as James and John Stuart Mill, who adopted and reworked many of the theoretical underpinnings of conjectural theory.

On the surface, it seems that in their speculations about social progress James and John Stuart Mill had postulated a stark binary contrast between civilized and uncivilized communities. Maine’s opposition between primitive/traditional and modern provided a new vocabulary to articulate this deep-rooted social division. But, this being true, I believed that the Mills retained many elements of stadial theory and deployed them in their argumentations about empire, albeit in a modified way. It is possible to find a similar undercurrent in the way that Maine conceived social progress and imperial rule.

Maine used many of the terms typical of stadial theory, such as savage or barbarian. Mostly, he did so without linking the terms explicitly with any vision of social progress. This was the case with the way in which he used the term savages in Ancient Law. The ‘customs of savages’ were here synonymous to those of backward peoples in general. In the same book it is possible to find the term barbarian more often, but when he used it, it was mostly applied to refer to Germanic peoples that migrated and settled in the Roman Empire. In Village-Communities there is a further reference to savages. Lubbok and McLennan, two of Maine’s contemporaries and reputed precursors of anthropology, contended that there were two stages of social advancement in which humans lived before grouping in families. Maine denied their claims by pointing out that ‘wild tribes’ in India had adopted usages from outsiders that scientists had later recorded as their own. In his lectures on the Early History of Institutions Maine talked about ‘our savage forefathers’, again as a general reference to ancient peoples. In a more revealing fragment of the same book, he referred to ‘societies, just emerging from the savage state’.

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128 Ibid.
129 Ibid.
130 Maine, Ancient Law, Ch VIII 298.
131 See, for instance, Ibid., Ch IV 104; Ch V 156 and 157; Ch VI 196.
132 Maine, Village-Communities, Lecture I 16.
133 Ibid.
134 Maine, Lectures, Lecture III 63.
135 Ibid., Lecture IX, 274.
Here Maine acknowledged the existence of a stage of social development distinctly characterized by savagery.

Notwithstanding the hints that these references offer, they are too scant and unsystematic to draw solid conclusions. The general lack of treatment of savages and barbarians in most of Maine’s books is understandable considering that Maine’s main and almost exclusive focus of Ancient Law, Village Communities, and Lectures on the History of Institutions was the Aryan family, comprised of settled societies that already practiced agriculture.\(^\text{136}\) The village-community, his main unit of analysis, was an agricultural society in miniature. For that reason, the lack of treatment of savagery and barbarism cannot be automatically read as evidence that Maine completely disregarded those social categories. In fact, he implicitly acknowledged the possibility of earlier states of society than that in which Aryan communities lived when he noted in the History of Institutions that the Roman and Hindoo systems (part of the Aryan race) covered a vast part of antiquity (but not all).\(^\text{137}\) Significantly, he added that the institution that was at the base of the social organization of those agrarian communities, the family, was not universal among savages.\(^\text{138}\)

The questions to which Maine turned his attention in his lectures on international law were somewhat different from those contained in his earlier works. The very nature of international law demanded a widened range of societies under consideration. In a passage discussing the warlike original condition of mankind and the cruelty associated with it, Maine mentioned the North American Indians and the Australian aboriginals as examples of savage races that exemplified humanity’s original practices and conditions.\(^\text{139}\) It is not a coincidence that he exactly referred to the two communities that from the seventeenth to the nineteenth century had been most often associated by Western thinkers with the stadial hunter-gather stage. He even added that Australians exhibited the animal instinct of torturing prey.\(^\text{140}\) This identification of savages with wild nature and wild animals was a classical way of underscoring their low social state.

Soon after this reference, Maine mentioned the Mexicans as a branch of the Indian ‘race’, remarking that they had attained ‘a certain degree of civilization’.\(^\text{141}\) This observation was in line with a vision of

\(^{136}\) He made this goal explicit in Ibid., Lecture III, 65.

\(^{137}\) Ibid., Lecture XI, 307.

\(^{138}\) Ibid.

\(^{139}\) Henry Summer Maine, International Law, A Series of Lectures Delivered Before the University of Cambridge 1887 (London, John Murray. 1915) 8.

\(^{140}\) Ibid., 9

\(^{141}\) Ibid.
historical evolution and social improvement based on the material condition of non-European societies that had historically informed European intellectual imagination. The urban, agriculturalist Mexica were separated by most commentators from almost all other Latin American and North American peoples that did not cultivate the land.

Finally, Maine discussed the appropriation of unoccupied territory in the context of colonial expansion. He referred to the doubts of the American Secretary of State about ‘how far the discovery of a territory which is either unsettled or settled only by savages’ gave a right to the discovering power. Without mentioning it explicitly, the doubts about whether savages were true owners of their territories seemed to be linked to the common assumption that savages were hunter-gatherers who lacked government and the notion of private property.

Maine accepted the existence of a savage state. Moreover, he used it as an analytical category, at least with regard to norms of international law. In the History of Institutions, while discussing the importance of horned cattle, Maine also mentioned the ‘pastoral stage of society’. He noted that there had been a lot of fruitless debates around the issue of whether cattle had only been of ultimate importance in that stage of society. He contended that evidence proved that the biggest service of cattle came at a later stage, when human populations settled over expanses of land and started to cultivate the land.

These series of passages suggest that Maine did not reject an explanation of history based on stadial theory. Still, it would be far-fetched to claim that recognizing the existence of different stages of social advancement amounted to placing them squarely at the center of the theory of social evolution. Maine never conceived of societies as holistic blocks on account of their forms of production. Nor did he explain the origin of political and legal institutions by reference to them. Still, for him material forces played a role in social change and the legal developments associated with it. When he discussed codification, Maine assumed that social and legal progress went hand in hand. The fulfillment of social wants was the engine that propelled the march of societies. Material civilization was the animating stimulus of legal change. Therefore, in those cases in which the rigidity of law limited material civilization, stagnation followed. Social necessities were always in advance of the law, and even though it was the function

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142 Ibid., 67.
143 Ibid., Lectures, Lecture VI 148.
144 Ibid.
145 Ibid.
146 Maine, Ancient Law, CH I 19.
147 Ibid., Ch II 23.
of the law to close that gap between social needs and the institutional capacity of a society to respond to them, because of the continuous nature of progress the gap tended to reopen again and again.\textsuperscript{148}

It was clear from these statements that material change preceded legal evolution. But the latter enabled and further stimulated the former. Both created a dialectical move and a virtuous circle of social improvement that lay behind the logic of progress. The formula for success in generating further progress thus resided in the capacity of the law to accommodate the progressive and productive forces of social evolution, and the difficulty in recreating those conditions accounted for the extremely limited number of societies that had become progressive throughout history.\textsuperscript{149}

Importantly, material amelioration was also related to the human/nature relationship, to the capacity of humans to control and dominate nature and natural processes. In a section of \textit{Ancient Law} dedicated to the discussion of the progressive commodification of goods that corresponded with their transfer from the category of \textit{res mancipi} to that of \textit{res nec mancipi}, Maine affirmed that the transfer started when ‘a society had reached a certain degree of activity’.\textsuperscript{150} Put differently, when the economic life that accounted for the material conditions of a particular society had expanded, ‘every fresh conquest of man over material nature’ was integrated into the category of \textit{res nec mancipi}.\textsuperscript{151}

Without a doubt modern society was a society in which material conditions were steadily and swiftly improving. Actually, the problem of legislation in progressive societies was that, more often than not, it could not keep up with the pace of discoveries, inventions, and the ‘manipulation of accumulated wealth’.\textsuperscript{152} This wealth was largely derived from the discovery of new laws and ‘facts of nature’ and the application of technology to the transformation of the environment that resulted in the improvement of humanity’s well-being.\textsuperscript{153} Maine conceived the human relationship with nature as a continuous battle. He believed that:

\begin{quote}
It is the urgency of the struggle for existence—a struggle in the West both with man and with nature—in the East a struggle less with savage enemies than with nature, not indeed unkindly, but extraordinarily capricious, and difficult to subdue for her very exuberance. The utmost available supply of human labor at first merely extracts from the soil what is sufficient for the subsistence…\textsuperscript{154}
\end{quote}

\begin{flushright}
\textsuperscript{148} Ibid., 24.  
\textsuperscript{149} Ibid., 22.  
\textsuperscript{150} Ibid., Ch VIII 272  
\textsuperscript{151} Ibid., 278.  
\textsuperscript{152} Ibid., Ch IX 305.  
\textsuperscript{153} Maine, \textit{Lectures}, Lecture VIII, 297.  
\textsuperscript{154} Maine, \textit{Village Communities}, Lecture VI 178.  
\end{flushright}
There is a clear influence of natural evolution and social Darwinism in Maine’s conception of life as an urgent struggle.\textsuperscript{155} This struggle had a social dimension that drew humans against their kind, but also a biological one in which humans constantly fought to dominate nature and elevate themselves above it. The feminine personification which Maine conceived of Indian nature is also interesting. India was like an exuberant woman that precisely because of her plenteousness could not be easily tamed.

The East and the West, primitive and modern societies, struggled to gain control over nature. However, whereas the latter had succeeded, the former were not able to do the same, stagnating at some point in their historical social evolution. One of the reasons that best explained this fact was the general belief in natural deities characteristic of traditional societies. In ‘the infancy of the race’ humans personified and deified natural phenomena.\textsuperscript{156} How could humans elevate themselves over nature when the latter had a sacred status? Like Acosta and other European intellectuals, Maine considered superstitious beliefs one of the reasons why ancient societies were non-progressive.

In a way characteristic of James and John Stuart Mill, Maine complemented the social gap that separated progressive and non-progressive societies with reference to differences in mental evolution. Maine gave a very important role to ideas in the history of progress. As he put it: ‘progress is, in fact, the same thing as the continued production of new ideas.’\textsuperscript{157} He further believed that the condition of thought of primitive societies such as India resembled the human mind in its infancy.\textsuperscript{158} It is interesting that he used a natural metaphor to describe primitive opinion, comparing it with ‘dense and dark vegetation.’\textsuperscript{159} Still, Maine, as had John Stuart Mill, conceded that the superiority of European intellect vis-à-vis the Indian mind was a question of degree rather than kind.\textsuperscript{160} The primitive mind was wild and uneducated, but amenable to improvement.\textsuperscript{161} Humans were comparatively intelligent in all states of society.\textsuperscript{162}

Notwithstanding various parallels in the progressive histories produced by James and John Stuart Mill and Henry Maine, the most remarkable similarity was that they all placed European economic life and the institutions that facilitated it at the apex of their scales of social progress. James and John Stuart Mill as well as Maine recognized various stages of social advancement. In numerous passages of his works

\textsuperscript{155} He praised the theory of natural selection and applied it to social facts in Maine, \textit{The Effects}, 26.
\textsuperscript{156} Maine, \textit{Ancient Law}, 4.
\textsuperscript{157} Maine, \textit{Lectures}, Lecture VII, 226.
\textsuperscript{158} Ibid.
\textsuperscript{159} Maine, \textit{The Effects}, 36.
\textsuperscript{160} Maine, \textit{Lectures}, Lecture 8, 128.
\textsuperscript{161} Maine referred to the uneducated mind of early times in \textit{Ancient Law}, Ch VIII 275.
\textsuperscript{162} Maine, \textit{Village-Communities}, Lecture II 56.
Maine talked about ‘early stages of society’, ‘first ages of the world’, ‘stage of development’, ‘early societies’, ‘relatively different stages of society’, ‘states of society’, ‘stage of society’, etc.\textsuperscript{163} Still, they all identified a stark contrast between the level of economic advancement characteristic of British industrial society and a few other European nations and that of the rest of the world. Their theories of social advancement rested on a binary opposition that opened up various different degrees of progress at its lower end, but always placed the European industrial economy at its apex.

\textit{The idea of evolution in international law and the evolution of international law}

As the nineteenth century progressed in Europe, it was evident that the ideological space for religious interpretation of social, political, and economic phenomena was reducing rapidly. Evolutionary theories challenged some of the main dogmas of the Christian creed, particularly those related to the time of the Earth and humanity, the origin of humans, and the human relationship with nature. The scientific challenge of religious doctrines meant neither that the Christian church lost its prominence and social influence nor that, from one day to the other, European society became secularized. Actually, the contrary seemed to be the case outside Europe: while the influence of Christianity certainly diminished in Europe by the end of the century, missionary work, especially in Africa, disseminated the Christian faith among an unprecedented number of people.\textsuperscript{164} By the end of the nineteenth century, Christianity was spread farther over the world than ever before.

While evolutionary thinking in Europe created further doubts about the veracity of religious beliefs, it also made many people cling even more fervently to their spiritual convictions. And even if Darwin’s theories posed a fundamental challenge to the assumed tenets of the Christian faith, theologians and scientists alike tried to reconcile scientific truth with God’s design.\textsuperscript{165} The Christian doctrine was flexible enough to accommodate or co-opt (according to one’s interpretation) new scientific discoveries. Evolution, for example, could be conceived as God’s design all along.

Despite efforts to reconcile the new scientific findings about the age of the Earth, humanity’s presence on it, and the evolutionary nature of life with old religious dogma, it was increasingly difficult to base scientific knowledge on religious principles. Academic and intellectual respectability was increasingly

\textsuperscript{163} Maine, \textit{Ancient Law}, Ch V 163; Ch VIII 255, 275. See also Maine \textit{Lectures}, Lecture I 8; Lecture V 141; Lecture VI 148, 156; Lecture X 285; Lecture XIII 394 and Maine, \textit{Village-Communities}, Lecture I 8; Lecture II 56; Lecture V 157, 161.


at odds with theories informed by particular religious creeds. One of the new nineteenth-century social sciences that most strongly felt the divorce between objective knowledge and belief was international law. A newly born discipline, international law had claimed for most of the nineteenth century a specific European pedigree, one closely linked to the Christianity of European nations and the Christian origin of the law of nations.

In the first history of the discipline, written in 1795, Robert Ward traced back the history of the law of nations to its Christian European roots. He had claimed that, in Europe, morality was comprehended within Christianity. A common spiritual and moral heritage had provided European nations with a solid foundation and a good degree of affinity which in turn created the possibility of sharing the same stock of laws. Christian religion was the cornerstone of the law of nations, a body of laws exclusively European.

Most commentators after Ward opened their treatises on the law of nations and international law referring to the same European history and the same religious origin. William Oke Manning is a good example. From the Greeks and Romans to Klüber and Martens the law of nations was squarely situated within Europe. It had historically evolved through the writing of a series of canon of lawyers (names like Suarez, Grotius, Pufendorf, Leibnitz, Selden, Zouch, Wolf, Bynkershoek, and Vattel, among others, were thrown into the mix) that for most of international law’s history (until U.S. lawyers acceded to the selected club) were exclusively European. Almost fifty years after Manning published his Commentaries, Henry Sumner Maine made a brief reference to the writers that had contributed to the development of international law. Remarkably, all the names he mentioned—Grotius, Pufendorf, Leibnitz, Zouch, Selden, Wolff, Bynkershoek, and Vattel—were included on Manning’s list. These

167 Ibid.
170 Manning added a few names from the U.S. such as Wheaton and Kent. See Manning, *Commentaries*, Book I Ch II 6-56. Manning’s list is much larger than the few names mentioned in my text. Together with the historical canon he included, for example, many of his contemporaries, such as Martens and Klüber.
171 Maine, *International Law*, 13-14. Despite affinities, Maine list was much shorter than that of Manning.
authors were not only important for historical reasons: in the absence of a general code containing the rules applicable between states, their writings were one of the main sources of international law.172

Christianity was part of international law in two other senses. Many nineteenth-century authors, especially those at the beginning and middle of the century, defined international law as the body of norms that existed among Christian nations, or what German jurists called Droit des Gens Moderne de l’Europe.173 In one of the most influential books on international law of the period, Wheaton defined international law as the group of norms shared and followed by civilized Christian nations.174 At the same time, the Christian faith was part of international law indirectly. During most of the nineteenth century several jurists had identified natural law as the spiritual underpinning or at least one of the founding blocks of international law. For many commentators, such as Manning, Phillimore, Levi, Bello, and Woolsey, natural law was totally based on or at least partly inspired by the will and dictates of God.175

Not all authors shared the conviction that Christianity was a constitutive element of the selective club that composed the international society—some of them were ready to widen the application of international law to non-Christian nations. Phillimore, for example, was sure that international law was applicable between Christian and heathen nations and also among heathen nations.176 Creasy was of the same opinion, justifying his ideas on the basis of expediency.177 The British Empire was formed of countless territories that encompassed multiple political communities, religiously heterogeneous, with which the empire needed to establish some sort of international legal relations.178 But even these more plural interpretations of the scope of international legality acknowledged that Christianity was the lighthouse of international law, or, as Creasy put it, ‘the surest and holiest of all guides’.179 Christianity assured a more precise, distinct, and accurate application of international law among the states that professed that religion.180 The Christian faith was also praised for its service as a cosmopolitan instrument for peace. Several international lawyers underscored its contribution to the humanization of the practices

172 In this regard see, for instance, Bello, Principios, Introduction §7 22-23; Manning, Commentaries, Book I Ch I 20; Polson, Principles, Section II §5 17; Phillimore, Commentaries, Preface vi, Ch VII §LX 58; Woolsey, Introduction to the Study, §32 36; Maine, International Law, Lecture I 2.
173 Reddie, Inquiries, Part I Ch II 146. See also Woolsey, Introduction to the Study, Introduction §5 4.
174 Wheaton, Elements, Vol I Part I Ch I §11 54.
176 Phillimore, Commentaries, Ch III §XXX 59.
177 Creasy, First Platform, Ch II §24 27.
178 Ibid., 28.
179 Ibid., 27.
180 Phillimore, Commentaries, Ch III §XXX; Creasy, First Platform, Ch II §24 27. Maine, International Law, Lecture II 34.
of war.\textsuperscript{181} And some like Leone Levi were convinced that Christianity, if genuinely followed, was the best tool to prevent war, due to its unparalleled ‘power to check passions’.\textsuperscript{182}

By the end of the nineteenth century, the influence of Christianity on international law weakened, but it did not completely subside. The first step toward its decline was the dissolution of the association of Christianity with Europe. With the entry of American states into the family of nations the ambit of the Christian faith expanded to encompass non-European Western and even non-Western nations.\textsuperscript{183} In addition, the admission of Turkey and Japan into the family of nations made it impossible to characterize the international community as exclusively Christian.\textsuperscript{184} At the turn of the twentieth century the definition of international law by reference to a Christian family had become obsolete.

In addition to these factors, the demise of natural law at the end of the century further contributed to lessening the influence of Christianity on international law. Divine will was no longer a valid source of international law. Secularism was gaining ascendancy in Western society, and the use of old religious categories as the foundation of international law during the last decades of the century was increasingly at odds with the new scientific spirit of the period and the impartial outlook of the discipline.\textsuperscript{185} But again this did not mean that the historical Christian roots of international law or the positive influence of Christianity on the family of states were ignored. In fact, similar to Creasy and Phillimore, it was precisely the British international lawyers at the turn of the century—Westlake, Lawrence, and Oppenheim—who emphasized that influence. They argued that the existence of a common faith, namely Christianity, was one of the factors that had most contributed to the development of a social bond between the states of the international community.\textsuperscript{186}

The steady demise of Christianity as an interpretative tool of social reality coincided with a great upgrading of living conditions in Western nations, at least among the most privileged social strata of the

\textsuperscript{181} See, for instance, Manning, \textit{Commentaries}, Book III Ch VII 144; Polson, \textit{Principles}, Sect. VI, §VII 42.


\textsuperscript{183} After the U.S. entered the selected club of civilized colonial nations at the end of the nineteenth century, the terms European and Western were used interchangeably by international lawyers. The concept of an international society was flexible. For instance, Westlake included European states, all American states, and a few other Christian states like Liberia. See Westlake, \textit{Chapters on the Principles}, Ch VI §10 81. Other authors that included the nations of the American continent in the family of nations were Manning, Polson, and Lorimer. See Manning, \textit{Commentaries}, Book II Ch IV 76; Polson, \textit{Principles}, Sect. IV §2 22; Lorimer, \textit{The Institutes}, Book II Ch II 101.

\textsuperscript{184} Turkey was already considered as part of the exclusive club of the family of nations by the middle of the century. See Polson, \textit{Principles}, Sect. IV §2 22-23. See also Oppenheim, \textit{International Law}, Introduction Part I Ch I IX §102 147-148. 10. Woolsey also noticed the growing importance of Turkey. See Woolsey, \textit{Introduction to the Study}, §§5 4.


\textsuperscript{186} Westlake, \textit{Chapters on the Principles}, Ch I 6; Lawrence, \textit{The Principles}, Part I Ch I §3; Oppenheim, \textit{International Law}, Introduction Ch I §7 10.
population. Standards of life raised in a large extent thanks to material improvements engendered by the fusion of scientific inquiry and technological innovation. These improvements provoked a quasi-religious scientific fervor. A confident scientific approach was applied to various spheres of human knowledge, converting those areas into scientific disciplines.

International law was one of the novel disciplines labeled scientific that soon acquired academic status and respectability. Jurists were part of the legion of engineers, inventors, investors, and social planners that were sketching the contours of a new society allegedly oriented toward the improvement of the human lot. As Pasquale Fiore affirmed, international lawyers formed part of the larger ‘intellectual and political movement of our time aiming at the organization of international society’. Once international law was defined in this fashion it became rather difficult to accommodate natural law as part of the new discipline. But, as in the case of Christianity, the move away from natural law was a long process, and was far from completed until the turn of the twentieth century.

Natural law was at the core of international law for most of the nineteenth century. This does not mean that there was either uniformity in the treatment of the subject, nor that natural law was the exclusive source to which authors looked in their attempts to establish a solid foundation for international law. Already mid-century authors such as Polson and Wildman put forward a positivist conceptions of international law, albeit far from identical. Whereas Wildman assertively stated that natural law had no part in international law, Polson still maintained that the law of nations was chiefly founded upon natural law. But, for Polson, that influence was only indirect. The direct basis of the law of nations was the will of states. So, natural law became part of the law of nations only when it was transformed into a positive rule through usage and convention. Moreover, positive law was not a mere reflection of the law of nature; it actually modified it.

Throughout the nineteenth century, the meaning of natural law and its influence on international law was delineated differently by commentators. This was a consequence of the fact that, as Lawrence noted, ‘each writer’s definition’ of international law was ‘coloured, to a certain extent, by his own views’.

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188 Neff, ‘A Short History’, 41.
191 Ibid., §VI 12.
192 Ibid.
193 Ibid.
194 Lawrence, *The Principles*, Part I Ch I §1 1.
During the last years of the eighteenth century Robert Ward had already endeavored to disentangle the law of nations from the law of nature.\textsuperscript{195} This differentiation was helped by the fact that, from the beginning of the nineteenth century, almost every commentator on international law made a two-part division of the science. Already, in 1832 and 1836 respectively, authors such as Bello and Wheaton distinguished between a natural and a positive law of nations.\textsuperscript{196} This binary division was later adopted by Manning, Reddie, Phillimore, Woolsey, and Creasy, among others.\textsuperscript{197}

Despite the unanimity in identifying two sources (natural and positive) of international law, there was still a plural understanding of what the law of nature was and its role in international law. Fervent Christian authors such as Phillimore and Manning related divine law with natural law. For Phillimore, natural law was just one of the branches of divine law.\textsuperscript{198} It amounted to the laws ‘written by the finger of God on the heart of man’.\textsuperscript{199} So the natural law of nations meant nothing else than Divine law. Similarly, Manning fused natural law with the will of God.\textsuperscript{200} Leone Levi shared this religious approach to international law but, in contrast with the predominant view that divided international in two branches according to its sources, he mentioned three such sources: natural law, divine or revealed law, and positive law.\textsuperscript{201}

A second group of authors distanced themselves from religious categories when trying to identify solid underpinnings for the discipline other than positive law. Some of these authors derived natural law from concrete and tangible—albeit general—elements. This was the case of James Reddie, for whom natural law stemmed from factors as diverse as the modes of production of nations, their mutual intercourse, and the ‘corporeal and mental constitution of mankind’.\textsuperscript{202} Wheaton defined natural law as the rules of justice observable among nations.\textsuperscript{203} Creasy and Woolsey founded the justice of international law and its natural character on moral and ethical principles.\textsuperscript{204} Humans were rational creatures that could understand abstract and ethical principles of conduct. In a similar fashion, states were defined as moral persons who had natural rights and obligations.\textsuperscript{205}

\textsuperscript{195} See \textit{supra} Chapter 6, page 294.
\textsuperscript{197} Manning, \textit{Commentaries}, Book II Ch I 57; Reddie, \textit{Inquiries}, Ch I 5; Phillimore, \textit{Commentaries}, Ch III §XXII 55-56; Woolsey, \textit{Introduction to the Study}, Introduction §3 3, §15 18; Creasy, \textit{First Platform}, Ch I §1 1.
\textsuperscript{198} Phillimore, \textit{Commentaries}, Ch III §XXIII 56.
\textsuperscript{199} Ibid.
\textsuperscript{200} Manning, \textit{Commentaries}, Book II Ch I 58.
\textsuperscript{202} Reddie, \textit{Inquiries}, Ch I 5.
\textsuperscript{203} Wheaton, \textit{Elements}, Vol I Part I Ch I §13 56.
\textsuperscript{204} See Creasy, \textit{First Platform}, Ch II 22-48;
The presence of natural law in international law began to fade in the last two decades of the century, but did so very gradually. Well into the 1880s there was still ample room to accommodate natural law as part of international law. In the Whewell lectures of 1887 Maine already noted that ‘the most useful and practical part’ of international law was positive law.\(^{206}\) Despite this promising statement, he immediately conceded that natural law was still the main source from which the discipline derived ‘its force and dignity’.\(^{207}\) And there were still authors like James Lorimer who upheld an extreme position concerning natural law, totally identifying the law of nations with the law of nature.\(^{208}\)

By contrast, Hall mounted the first serious attack on natural law. He identified two general views on the rules of international law. On the one hand, there were authors that distinguished between international positive laws and international rights.\(^{209}\) Others like him thought that the only valid rules of international law were the existing ones, that is, the rules that had been transformed into positive law.\(^{210}\) Hall admitted that his position was less predominant among his fellow international legal scholars.\(^{211}\) One of the main reasons why Hall was against abstract absolute rights was that the ultimate source from where they emanated was impossible to identify with a good degree of scientific certainty.\(^{212}\) Was it the will of God, natural law, or some other metaphysical principle?\(^{213}\)

Hall was the first to hint that the scientific outlook of the academic discipline of international law could no longer be easily reconciled with a conception of international law based on unscientific standards, natural law among them. Still, he fell short of completely divorcing international law from extra-legal sources that conferred normative force to the discipline. Some international usages, for example, incarnated ‘certain moral obligations’.\(^{214}\)

Despite Hall’s concessions to morality, the tide of opinion regarding natural law and natural morality was definitely changing. This was visible in the assertiveness with which international commentators tried to get rid of the last vestiges of the influence of natural law on the discipline at the end of the century. This trend was evident in the writings of Lawrence, who judged it inappropriate to base international law on transcendental rules that obliged states as ‘moral beings’.\(^{215}\) International law was not an abstract

\(^{206}\) Ibid., 32.
\(^{207}\) Ibid.
\(^{208}\) Lorimer, The Institutes, Introduction Ch I 1, Book I Ch I 19.
\(^{209}\) Hall, International Law, Introduction 1.
\(^{210}\) Ibid.
\(^{211}\) Ibid., 1-2.
\(^{212}\) Ibid., 2.
\(^{213}\) Ibid.
\(^{214}\) Ibid., 5.
\(^{215}\) Lawrence, The Principles, Part I Ch I §1 2.
instrument but instead a concrete science, the purpose of which was to ascertain ‘by observation the rules actually followed by states in their mutual intercourse, and to classify and arrange these rules by referring them to certain fundamental principles on which they are based’. For Oppenheim, the only source of international law was the consent of the members of the international community.

Lawrence and Oppenheim more than any commentator before them drew a clear-cut line between international law and international morality. The latter was still important as a mirror in which the former could look in order to find a contrasting reflection, once based not on legal but on ethical standards. Once the split between these two modes of judging international phenomena was complete, morality was no longer an in-built mechanism of international law. The same international action had two dimensions that did not necessarily match: an action could be legal but immoral, and the other way around.

At the end of a lengthy process, international law had, to a large extent, changed its outlook. Much had apparently changed from previous times. The science of international law was now imbued with features such as objectivity, impartiality, rigor, consistency, and precision. It aspired to neutrality by distancing itself from the tumultuous and subjective realm of politics. The nation-state, sovereign over its territory, was the fundamental unit of analysis. The free will of those entities created law—a voluntary, discernible, and factual law. And still, even at the peak of affirmation of the positivist nature of international law, someone like Lawrence still affirmed that international law was related, if only historically, with ‘a few great ethical principles’.

The loss of religious and moral inspiration deprived international law of a notorious part of its normative force. These were not the only cosmopolitan vocabularies to recede. Utilitarianism had provided for most of the nineteenth century an intellectual stimulus for social improvement and legal change. And none other than Jeremy Bentham had coined the very term ‘international law’ by which the discipline was increasingly known as the century progressed. Utilitarianism also had a certain influence on international law. Edward Creasy, for instance, dedicated a whole chapter of his book Platform of International Law to demonstrate that utilitarianism was the best ‘standard of international law’. Nevertheless, at the end of the nineteenth century utilitarianism had lost much of its former appeal and

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217 Ibid., §5 8.
218 Ch II §11 16.
219 This was one of the objectives of the Institut de droit international. See Koskenniemi, *The Gentle Civilizer*, 61-62.
222 Creasy, *First Platform*, Ch III 49-64, 50.
was clearly in retreat as an ideological influence in British society.\textsuperscript{223} In \textit{Ancient Law}, Henry Maine highlighted the predominant discontent toward Bentham’s theory of jurisprudence.\textsuperscript{224}

Despite the weakening of natural law, the receding influence of Christianity, and the demise of utilitarianism, international lawyers were not ready to renounce either the moral orientation that these universal vocabularies had provided to their discipline or the ethical force behind the transformative cosmopolitan project of uplifting mankind and uniting it under a common—albeit ‘Westerncentric’—legal order. If international law was merely law as it was and not as it ought to be, how could it retain its transformative purpose?

Considering all these factors, international law was in need of an extra-legal yardstick that allowed it to retain its scientific respectability without compromising its transformative and normative force. This was a pressing task, considering the liberal agenda of reforms envisaged by the international lawyers of the \textit{Institut de droit international} and the political nature of the issues they dealt with. The cosmopolitan pull of empire added to this need. Remaining strictly technical would have limited the influence and power of a profession that considered itself ‘the conscience of the civilized world’.\textsuperscript{225} But how exactly could an extra-legal criterion inform international law without being open to the criticism of being subjective and unscientific?

The application of the idea of evolution to the field of international law resolved this puzzling question.\textsuperscript{226} At the end of the nineteenth century, evolutionary theories were in fashion. Not without controversy and contest, they had acquired an immense scientific reputation since the publication of Charles Darwin’s \textit{Origin of Species}.\textsuperscript{227} But evolution was such an open-ended term that almost anything that was progressive could be accommodated within its conceptual umbrella. Precisely for this reason, it conferred the possibility of making a broad set of claims, those that reflected the particular worldviews of its exponents. According to Casper Sylvest, ‘the idea of evolution—despite, or perhaps because of, its indeterminate meaning and wide range of reference encompassing biological, social and legal forms—took over some of the functions formerly fulfilled by the idea of a natural law.’\textsuperscript{228} Evolution was easily

\begin{thebibliography}{9}
\bibitem{223} Koskenniemi, \textit{The Gentle Civilizer}, 40.
\bibitem{224} Maine, \textit{Ancient Law}, Ch V 118.
\bibitem{225} Koskenniemi, \textit{The Gentle Civilizer}, 95.
\bibitem{228} Sylvest, ‘The Foundations’, 59-60.
\end{thebibliography}
applicable to international law because it was based on science and, hence, it fitted nicely within the new boundaries of a novel discipline that aspired to scientific status and was thus eager to consolidate an aura of truth and certitude required to regulate and guide international life.

International lawyers used the idea of evolution for two purposes. First, evolution allowed them to overcome the ‘Austinian challenge’, which denied the legal character of international law, characterizing it as mere positive morality.229 Not all international lawyers used the idea of evolution to defend the fact that international law was law. One reason was that for most of the nineteenth century that idea was not there to start with. So, international lawyers adopted different strategies in order to confront Austin’s conception of law as the command of a superior sovereign whose authority derived from the threat of sanction. Some like Manning and Lawrence contested Austin’s conception of law by broadening its definition.230 Lawrence charged Austin with having adopted one of the various elements of the notion of law as the only valid one.231 Creasy agreed with Lawrence on the existence of various contrasting definitions of the term law, and gave the example of the definition given by Richard Hooker,232 also cited by Manning and Lawrence. Hooker had several centuries before already provided intellectual ammunition to challenge Austin’s conception of law in his book On the Laws of Ecclesiastical Polity.233 Hooker had postulated that law could be used in a wider sense than the mere enactment of the command of a superior.234 Another possibility was to define law as ‘any kind of rule or canon, whereby actions are framed’.235 According to Manning that was the sense in which the law of nations had historically been understood.236

It is curious that while Maine built one of the most solid arguments against analytical jurisprudence he did not use his own conclusions to defend the legal character of international law. The main question that Maine took issue with regarding Austin’s challenge to international law was the lack of sanction. For Maine, Austin made a mistaken assumption regarding the nature of the human being. Against Austin, Maine suggested that obedience of rules did not stem from fear of punishment, but rather from mere

229 Ibid., 49-50.
230 For Lawrence that expansion was not incompatible with ‘scientific accuracy’. See Lawrence, The Principles, Part I Ch II §10 12.
231 Ibid.
232 Creasy, First Platform, Ch I §10B-12 8-10.
234 Ibid., Book I Ch III §1 205.
235 Ibid.
236 Manning, Commentaries, Book I Ch I 5.
237 Maine, International Law, Lecture II 50.
routine, or the unconscious repetition of a habit. Maine conceded that international law had no sanctions, but there were other reasons apart from sanction that explained why norms were followed. Maine maintained that within international society there was an expectation of compliance that derived from a general ‘law-abiding sentiment’. International law was socially necessary and had the general approval of the members of that system: states.

A similar line of argumentation was followed by Westlake and Oppenheim who, like most end-of-century international lawyers, put forward a sociological explanation of international law. Science, technology, Christianity, civilization, and progress had created a bond between states. Modern life was in flux, following the progressive nature of the times. There was a need for a legal system that glued the heterogeneous elements of modern life together. International law was the necessary product of the growing internationalization of modern life and the creation of a community of states that needed to regulate their interactions. Precisely because of this necessity there was a compelling need to obey international law. International regulations, Westlake maintained, were more often than not followed. This regularity and the fact that force could be used in cases of breach of the law to convince a non-compliant state to abide by the rules was enough to assure the legal character of international law.

Westlake agreed with Maine that due to the social need for international law there was a general feeling of obedience among the international community. And even in cases where that feeling was not enough, Oppenheim argued, the international community could impose sanction to discipline law breakers.

Henry Maine not only defended international law against Austin’s characterization of it as international morality. In addition, he directly attacked the core of Austin’s assumption about what law really meant. The problem with Austin, and Bentham for that matter, was that they had applied to completely different historical scenarios the conclusions that they derived from the circumstances of their own times. It was only in Rome and the most progressive nations of Europe and America that a conscious attempt at legislation was made. Similarly, only in those societies was law equivalent to the command of a sovereign.

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238 Ibid.
239 Ibid., 51.
240 Ibid.
242 This was the argument of Lassa Oppenheim in *International Law*, Vol I Introduction Ch I I §4-7 6-12.
244 Ibid.
245 Ibid., 2-3
The more one looked back in history and immersed oneself into primitive times, the more one found a conception of law completely alien to Austin’s definition.\textsuperscript{248}

In primitive times most people followed the customary rules of the village communities.\textsuperscript{249} There was no legislation in those communities, but instead the constant repetition of ancient practices whereby life was regulated.\textsuperscript{250} Maine claimed that throughout the history of the Aryan communities there had been two different kinds of political organization that in turn had given rise to two different kinds of law. On the one hand, there were primitive communities in which life was regulated through custom and only sporadically by the commands of a superior ruler;\textsuperscript{251} on the other, there were the progressive nations. In these political communities, now in the form of territorial states, while local customs slowly disintegrated legislation was ever increasing.\textsuperscript{252} Primitive and modern societies had a different kind of law.

While custom was the predominant legal form in ancient times, the commands of a sovereign legislative authority were only the product of modern civilization. According to Maine, law as Austin had conceived it was only the result of a lengthy historical process in which States extended over a large territory, families and tribes dissolved into a more uniform body of citizens, and European nations adopted many of the legal rules of the Roman Empire.\textsuperscript{253} The force of the legislature due to the existence of a sovereign and sanctions was a specific product of modern life. The error of Austin had been to adopt those specific categories as universal legal standards.

The implications of Maine’s argument were important for rescuing international law. Law was a historical product. It evolved according to the social evolution of different branches of the Aryan family. As societies changed, the form of the norms changed accordingly. In consequence, international law did not need to be exactly as Austin demanded in order to be considered law. International lawyers conceded that Austin was partly right in affirming that international law was not as perfect—in the sense of perfectly legal—as other branches of law. Maine was the first to recognize that international law suffered ‘some real defects’.\textsuperscript{254} However, they also believed that Austin had wrongly disregarded the possibility that the new science would one day evolve, gaining the maturity that it still lacked. Nineteenth century international lawyers placed their discipline in a temporal framework. Looked from that perspective, the

\begin{footnotesize}
\begin{enumerate}
\item Maine, \textit{Ancient Law}, Ch I 7-8.
\item Maine, \textit{Lectures}, Lecture XIII 389-392.
\item Ibid.
\item Ibid., 392.
\item Ibid.
\item Ibid., 394.
\item Maine, \textit{International Law}, Lecture II 52.
\end{enumerate}
\end{footnotesize}
potential of international law to become as sound a legal discipline as any other legal branch placed it in a position of parity vis-à-vis domestic law.255

Following Maine, Oppenheim stated that in primitive communities law was custom.256 There was thus no need for a legislative or judicial body.257 Law existed there, where there was a community that needed to be regulated.258 Social reality was the basis of law. As Lorimer explained, international law ought to have existed since the first time in the history of humanity that two separate political units emerged.259 In the same way in which primitive law was customary, the law of nations had been for many centuries the result of the conduct that states followed in their mutual relations.260 But customary international law was complemented by ‘more and more’ written international regulations that were ‘daily created’ in modern times.261 For Westlake, if international law was deemed mere morality, as Austin had proposed, if its evolution was negated, there was a real risk of hindering ‘the progress of mankind by depreciating the less ripened claims’.262

Like Oppenheim, T. H. Lawrence followed Maine (something he explicitly recognized) in his critique of Austin and his defense of an evolutionary conception of international law.263 Law in general was the fruit of historical developments, a fact that Austin, as Maine demonstrated, had overlooked.264 International law as with other types of law followed an evolutionary logic.265 As humans progressed, the notion of force became gradually obsolete.266 The same process affected states. As they reached maturity, they needed less and less forcible compulsion to obey international regulations. International law had paid a great service to humanity, ‘and on stricter observance and further development’, Lawrence proclaimed, ‘rest some of the fairest hopes for the future of our race’.267

257 Ibid.
258 Ibid.
259 Lorimer, The Institutes, Introduction Ch IV A 12.
261 Ibid., §8 12.
262 Westlake, Chapters on the Principles, Ch I 13.
263 In fact, most of Lawrence first essay ‘Is there a True International Law’ was a repetition of Maine’s ideas. Another author that he incorporated into his analysis was Richard Hooker. See Thomas Joseph Lawrence, Essays on Some Disputed Questions in Modern International Law (Cambridge, Dighton, Bell and Co., 1885) Essay I 1-40.
264 Ibid., 7.
265 Sylvest, International Law, 59
266 Ibid., 25.
267 Ibid., 40.
Even Lorimer, who accepted that international law was the ‘least developed’ of all legal disciplines, upheld the modern—if incomplete—character of international law.\(^{268}\) And the good news for international lawyers is that their discipline was ever evolving. As Lorimer explained with regard to the law of nations:

In historical times it is continually growing, not only as a science, or thing known, but as a fact or thing to be known. Human activity is a factor in its growth as well as human reason. As the lives of individuals or nations progress, as they increase in refinement, wealth, and power, new relations are developed, and new sources of positive law spring up. There was always, as we have seen, a natural law of the relations of separate communities, and this was more or less consciously recognized, as the tide of reason, and consequent civilization flowed or ebbed.\(^{269}\)

Lorimer, like Maine, Lawrence, Oppenheim, and Westlake, was sure that the march of progress and civilization in the Western world went hand in hand with the development of the science of international law. This precisely was the ‘trade mark’ of the discipline. But the idea of evolution was not only used in an inter-European or Western context. It was also applied to the wider world. In the context of European expansion there was an imperative need to classify societies according to their level of social advancement in consonance with the new scientific dictates of modern anthropology. In that regards, the evolution of international law was animated by the necessity of applying it to guide the evolution of inferior races.

International legal regulation became a progressive instrument for spreading and applying European superior ideas of administration, economics, and law to the rest of the world. The mission of imperial government oriented to human improvement fitted nicely with the liberal internationalist ideology of the late nineteenth century and its double task of bringing progress and order to the international sphere.\(^{270}\) This international program of action could be encompassed within the idea of social evolution. Legal and social evolution intertwined, allowing international lawyers to look at the non-Europeans as the perfect scenario in which to test various—even, at times, opposing—progressive visions.

The fact that the same concept—evolution—was used to substantiate contrary claims reveals the instrumental use of this idea. When applied in relation to international law, evolution served to defend its equality vis-à-vis other legal branches. Its potential to become a complete scientific discipline was enough

\(^{268}\) See Lorimer, *The Institutes*, Book I Ch I 20, Introduction Ch IV 11.
\(^{269}\) Ibid., 12-13.
to buttress that claim and guarantee international law’s high status. However, the idea of social evolution applied to non-European communities underlined the disparity between those societies and European industrial nations. Instead of underscoring non-Europeans’ potential for change, the idea of social evolution emphasized the gap that separated progressive and primitive nations. It was precisely the closure of that gap that justified progressive—albeit in practice often violent if not genocidal—international standards and imperial rule. Whereas the evolution of international law underscored its maturity, the idea of social evolution applied to non-European primitive societies was based on the immaturity of the latter and their need for guidance. It was precisely the civilizing mission that called for a deployment of international law in Western colonies. Paradoxically, this need became one of the ultimate proofs of its growing importance and maturation.

Evolution was not the only element that conferred on international law a certain status and traction. The scientific character of the discipline permitted a new claim to universality. Having a radically different outlook than natural law, international law was still universally applicable. Besides, it remained linked to the cosmopolitan project of providing a legal basis for the articulation of legal relationships both within the sphere of civilized nations and outside it. In fact, the main aspiration of science was precisely the achievement of indisputable truth. Arguments fashioned in a scientific style carried an authority that the new legal elites gladly welcomed. In this sense, the two aspects of the idea of evolution combined.

Once international law was proved to be a science, the introduction of the idea of social evolution as a measuring stick to uplift primitive societies as part and parcel of the new discipline became scientifically validated. This allowed the reconciliation of a façade of objectivity with the introduction of a claim of superiority that oscillated between two different versions of the same civilizing project. Colonial powers evidenced at times an interventionist pull that materialized in an attempt to thoroughly transform the uncivilized and their surroundings. Other times, they had a more lenient approach that consisted of demarcating two spheres of action within colonial societies: one in which the backward non-Europeans lived their traditional lives, and another in which advanced Europeans could carry on their modern economic life.

271 That was the case of the Congo, where 8 million people perished under a reign of terror. On this point, see, for instance, Koskenniemi, The Gentle Civilizer, 155-156.

272 This was a particular form of universality marked by its progressive outlook. According to Jennifer Pitts this was a ‘universalism premised on a narrative of progress’ which regarded ‘different treatment for various groups (both across societies and, often, within them) not only as defensible, but as indeed required by the moral duty to assist the backward to advance’. See Jennifer Pitts, ‘Boundaries of Victorian International Law’ in Duncan Bell (ed.), Victorian Visions of Global Order, 67-88, 70.
At the end of the nineteenth century the British Empire generally adopted the second alternative in its dealings with colonial populations. The postulates of Maine regarding legal evolution and imperial rule were of utmost importance in shaping this administrative line of action, traditionally known as indirect rule. As he noted, evolution was a slow process that assured order and avoided revolts.

Maine, Lugard, and the government of the British Colonies: Indirect rule

During the second half of the nineteenth century several rebellions and wars of resistance shook the British Empire. The Indian mutiny, the governor Eire controversy, and the Maori wars, which took place within a small amount of time, forced the British to rethink what was the best way to manage their empire. The British came to realize that non-European communities under their rule were less amenable to their will and their dictates than they had assumed. In the aftermath of tumultuous waves that destabilized the Empire, the liberal goal of civilizing the uncivilized seemed less urgent than the need for maintaining order within an Empire of myriad heterogenic peoples. This was the context in which Maine presented his novel understanding of social progress, one that was to have an effect on the way British imperialism proceeded at the end of the nineteenth century.

Apart from his contribution to the intellectual consolidation of the idea of legal evolution, Maine’s theories played a large role in shaping new conceptions of administration in the British Empire. India was the main laboratory where Maine, like previous British thinkers, tested his hypothesis. For James Mill, John Stuart Mill, and Maine the main problem with India was its stagnation. But whereas the former assumed that benign despotic rule through the EIC and enlightened legislation could put Indian society back onto a progressive path track, Maine inverted this idea. For him, mere British presence radically affected traditional Indian society, threatening disintegration. For this reason, he was convinced that, under British influence, India as he knew it ‘was passing away’.273 Spontaneously, just by mere contact with a superior ‘civilization’ (the British), India was steadily losing all its ancient features.274

Maine was aware that British experts thought that the population of India was too attached to their traditions and customs.275 There was a good degree of truth in that characterization. India was, indeed, an ignorant and superstitious society. This state of affairs largely explained its immobility.276 At the same

273 Maine, Village-Communities, Lecture I 24.
274 Ibid.
275 Ibid.
276 Ibid., 25.
time, precisely because of the general ignorance of the masses, the ideas and influences of the upper intellectual classes had an impact on the other strata of the population that had no historical parallel. Contact with British superior ideas had already set in motion a process of assimilation and modernization of the upper classes that, in time, was to transform the whole country. The change that the presence of the British had elicited was not the result of the use of force. It was actually the British’s superior level of social progress that accounted for the alterations that were sweeping Indian society.

In this light, the main challenge of imperial rule was not the intentional modification of Indian society in order to bring it to an improved condition, as mere contact with the English was enough to shake the foundations of that society and trigger modernization. The question was rather how to help India’s transition toward modernity with the minimum degree of turbulence and turmoil. Maine’s theoretical conclusions and Non-Europeans’ violent resistance against British rule had convinced British administrators that Indian institutions, ideas, and customs had to be protected from the quick disintegration that was certainly to follow from Western imperialism.

Theoretically, governing a non-European traditional society according to the most progressive ideas of the modern occupying power seemed a sensible approach to imperial rule. But that required thorough knowledge of the society that was going to be changed. A good understanding of primitive societies provided colonial administrators with know-how as to the better course of progressive reform. This was an ideal that was often not realized in practice. In the case of India, British administration had failed to understand local institutions and practices. They had interpreted Indian reality through distorted lenses. For instance, English administrators had not recognized that the Indian village community was both an organized patriarchal society and a union of co-proprietors. This mistake had produced some of the gravest errors in the administration of the subcontinent.

According to Maine, the case of India was not exceptional. The English tended to make mistakes when appraising foreign social forms whenever they were brought in contact with communities whose institutions were in an earlier stage of development than those of their own civilization. They could not remove the modern lenses with which they contemplated the world, and hence they projected their specific social, political, economic, and cultural categories on societies that functioned under a
completely different logic.\textsuperscript{283} In light of this difficulty, Maine believed that any attempt to rule Indians according to the British interpretation of their ideas and institutions was in vain. Moreover, as resistance to British rule in different imperial locations had shown, the old way of administering colonies and dependencies exposed the Empire to violent reactions.

Criticism of imperial rule did not amount to the conviction that the British ought to abandon their responsibility to transform Indian society according to their own superior image. It only underscored the fact that any quick attempt to radically shape India based on deficient knowledge was doomed to fail. Maine believed that the superiority of modernity vis-à-vis tradition/primitiveness, once two societies that represented these two models came into contact with each other, unleashed an automatic process of osmosis or absorption of the higher by the lower.\textsuperscript{284} Steady codification was a sound tool for improvement. Importantly, it also guaranteed stability. Maine was convinced that once a society was touched by progress, improvement spontaneously followed. Progress, he claimed, spread ‘like a contagion’.\textsuperscript{285} It was then the responsibility of the British to rebuild in its image the naturally shattered fragments of primitive society.\textsuperscript{286} In order to do so, British rule had to find the right tempo. If the pace of change was too slow, improvement was compromised. But too rapid modification undermined security.\textsuperscript{287}

It was the last of these two values—the security of Empire—that got the upper hand in imperial debates about the right course of action in the colonies during the late nineteenth century. The followers of Maine emphasized the need to protect and preserve local institutions within the Empire. The practice of indirect rule through non-European institutions was sensitive to Maine’s insights and, at the same time, appeased British fears.

For Maine, even a non-assimilationist and non-interventionist imperial approach to the colonies still guaranteed the transformation of primitive societies. Once progress touched primitiveness, the former started slowly to alter the latter until backwardness dissolved and the colonized society started moving toward modernity. He admitted that it was ‘by its indirect and for the most part unintended influence that the British power metamorphoses and dissolves the ideas and social forms underneath it’.\textsuperscript{288} This was

\textsuperscript{283} Maine, \textit{Village-Communities}, Lecture VI 182.
\textsuperscript{284} Maine, for example, noticed that superior English laws started to permeate the incomplete Indian legal system. See Maine, \textit{International Law}, 18.
\textsuperscript{285} Maine, \textit{The Effects}, 37.
\textsuperscript{286} Maine, \textit{Village-Communities}, Lecture I 28.
\textsuperscript{287} Maine, \textit{The Effects}, 37.
\textsuperscript{288} Maine, \textit{Village Communities}, Lecture I 28.
the historical progressive force of imperial rule; a necessary force, it seemed, because, as Maine noticed, no other nation in the history of humankind with the exception of the Ancient Greeks had been able to engender progress spontaneously. Such was the English mission in India: transforming without consciously assimilating, re-shaping without force, without creating tension or turmoil. Furthermore, the English were a mere piece of the impersonal engine of progress. In their imperial dependencies they were just passing the torch of enlightenment that they had previously received:

It is this principle of progress which we Englishmen are communicating to India. We did not create it. We deserve no special credit for it. It came to us filtered through many different media. But we have received it; and, as we have received it, so we pass it on. There is no reason why, if it has time to work, it should not develop in India effects as wonderful as in any other of the societies of mankind.289

It is worth noticing that whereas John Stuart Mill was critical of his contemporary society, Maine did not utter a complaint other than that directed against democracy. Modernity, if managed according to his conservative/progressive creed, was no doubt a blessing for humanity. Still, he qualified his binary distinction between modern and traditional/primitive by noting that the traditional and the modern were often more enmeshed that one would think at first sight.290 There was an element of civilization in ancient societies, as well as ancient traces in modern ones. India, for instance, was a barbarian region that contained a considerable part of European civilization.291

Maine’s concerns about the stability of the British Empire travelled to Africa. The Indian mutiny and its civilian rebellions in 1857 demonstrated, to British eyes, the difficulties of imposing a rational model of life over irrational societies. In fact, the fear of entropy permeated European bourgeois societies at the end of the nineteenth century. Social unrest and turmoil at home which threatened the social order and status quo showed just how fragile civilization was.292 Even though British rule in Africa was an ad-hoc experiment for decades, the publication of Lord Lugard’s The Dual Mandate in British Tropical Africa in 1922 elevated the administrative system known as indirect rule to the status of a religious dogma.293

290 Ibid., 31.
291 Ibid., 15.
293 At least that was the opinion of Lord Hailey, the author of the influential African Survey, a magnus opus of research on Africa for colonial administration. See Lord Hailey, ‘Some Problems dealt with in an African Survey’ 18 International Affairs (1939) 194-210, 202.
Since the date of its publication, no other book like *The Dual Mandate* exercised such a great influence on imperial administration in the British African colonies. Lugard’s theoretical framework for British rule resolved some of the challenges that British rule often encountered in Africa. On the one hand, it tipped the balance of administration in favor of stability rather than reform. In a vast empire of myriad peoples and extensive territories, peace was a cherished value. On the other hand, indirect rule helped in addressing a practical problem of colonial administration. The British Empire struggled to have an efficient administration due to the scarcity of human resources and the difficulty of transportation in Africa. Lugard himself had at his disposal only 231 officers in Northern Nigeria to rule a population of seven million. Finally, by aligning with supposed tribal traditional chiefs, the British shifted the balance of power of African societies to the rural world. Once that world had been militarily conquered, and tribalism no longer represented a locus of resistance, having chiefs as allies allowed the British to disempower dynamic urban elites who could be a destabilizing progressive force in the colonies.

Lugard started *The Dual Mandate* by examining the state of Africa before European rule. In contrast to coastal Africa, which had been part of commercial routes for centuries and thus part of the larger history of mankind, the interior of Africa had remained a blank space in European maps. Therefore, its penetration by imperial powers could be compared to the discovery of America. But unlike America and several other regions that housed great civilization, the lack of monuments and cities in the interior of Africa revealed that no remarkable civilization had existed in pre-colonial Africa. In fact, Lugard affirmed without hesitation that the general state of Africa before colonization was ‘deplorable’.

This negative conclusion about the continent foregrounded his examination of the civilizational status reached by Africans. As was common among Western intellectuals, he ordered Africans in different classes according to their level of social sophistication. In order to do so, he followed the stages of social evolution outlined by Henry Maine. He distinguished mainly between three groups: the primitive, the advanced, and the Europeanized Africans. The primitive Africans could also be classified in two sub-groups. First, there were those who were still in the patriarchal stage, whose political organization was

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296 Mamdani gives the example of South Africa. Ibid., 91-93.
298 Ibid., 1.
299 Ibid., 5.
mainly based on family groups. Lugard described this human compartment in the worst terms possible. They were prey to ‘cruel superstitions’ and ‘degrading practices’, such as cannibalism and the sacrifice of innocents. In between the most primitive and advanced Africans were communities that recognized a chief and had tribal organization. This group had managed to move away from patriarchal power relations, arriving to the tribal stage. But despite being able to consolidate more advanced political structures, these groups reproduced some of the most negative practices of patriarchal societies.

It was only when the ‘negro aborigines’ were conquered by a superior Aryan race and converted to Islam that advanced communities flourished in Africa. One step forward in this direction was the introduction of a monotheistic religion, which dispelled many of the myths and superstitions of the populace. Besides, the introduction of a written language and the superior political and material culture of the Arabs helped those Africans under Muslim influence to advance. Advanced Africans practiced trade and agriculture and had centralized states. They also built cities and had industrial arts. They were in an intermediate condition between primitive Africans and the progressive Europeanized classes.

Those Africans who had been brought up under European influence were just an exiguous part of the whole African population. But despite their reduced numbers they had great political influence on African affairs. They were a kind of African bourgeois class, mentally superior to the other groups, and in proportion to their few numbers far more powerful than them. Because of their social progress one could think that the educated Africans would be able to govern their own people. However, Lugard disagreed. Living in cities, they were removed from and out of touch with the common rural African that they ought to rule. Furthermore, despite their merits, they lacked the capacity and skills to rule their backward fellow Africans.

Lugard believed that of all the different social types, the primitive Africans in the ‘early tribal stages’ constituted the majority in British Tropical Africa. The abject condition of Africans was the strongest call for alien rule. As Lugard reminded his audience, the Treaty of Versailles recognized the fact that ‘the

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300 Ibid., 75.
301 Ibid.
302 Ibid.
303 Ibid., 75-76.
304 Ibid., 76.
305 Ibid., 76-77.
306 Ibid., 79.
307 Ibid.
308 Ibid., 79-80.
309 Ibid., 84.
310 Ibid., 214-215.
subject races of Africa are not yet able to stand alone’. European imperialism was to guide them in this noble pursuit.

After justifying the humanitarian character of empire, Lugard proceeded to explain what he thought was the most suitable system for imperial rule in Africa. Like Henry Maine, Lugard was convinced that British rule had a disintegrating effect on African traditional structures, particularly among the most primitive communities. This was a natural outcome, considering that in confronting British rule the primitive African had to come to terms with ‘ideas a thousand years in advance of his mental and social equipment’. Under these circumstances it was impossible to maintain African ancient structures exactly as they had been traditionally. Lugard, like Maine, was convinced that ancient societies such as those found in Africa were already changing upon contact with modern ones. So, preserving them exactly as they were in pre-colonial times was impossible. By the same token, reinforcing traditional structures of government that were responsible for the immobility and stagnation that pervaded African societies was not an option.

What was needed was a system that allowed a course of action between these two either impossible or unwanted alternatives. That basically meant helping old structures adapt to new circumstances (modern British ways) without generating social disintegration and chaos. In other words, the final goal of indirect rule was to safeguard the cohesiveness of a government that sought to reconcile two seemingly incompatible worlds: one that was progressing toward a modern future, and another that had remained in the primitive past. That system was indirect rule, and the two main policies of the system were decentralization and continuity.

This in practice meant that Africans should be left to manage their own affairs to the largest degree possible, always according to their level of social development. Throughout his treatise Lugard emphasized the need to interfere as little as possible with ‘native customs and modes of thought’. He affirmed, using a terminology that resembled the postulates of Maine, that administration ought to be fashioned as ‘evolution’ rather than ‘revolution’. In the same vein, he maintained that trying to promote

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311 Ibid., 197.
312 Ibid., 215-216.
313 Ibid., 217.
314 Ibid.
315 Ibid.
316 Ibid., 96.
317 Ibid., 94.
318 Ibid., 193.
319 Ibid., 194.
too quick a progress among backward Africans was far more dangerous than going too slowly. Keeping ancient tradition and political structures while at the same time introducing modern principles of administration that guided African chiefs made it possible to have it both ways.

The British and the ‘native’ spheres of influence ought to communicate with one another. To that end, Lugard recommended cooperation between the whole chain of administration, especially between provincial officers and local African authorities. That would keep in check the inherent tendency of backward African societies to stagnate. British supervision and education of the African chiefs was to guide the slow progression and adaptation of traditional structures to modernity without compromising their very existence and role. Through the administrative chain of colonial rule, British progressive impetus would also be partly diluted, so as to alter archaic structures without compromising their very existence and, hence, antagonizing the local population. In that way, progressive colonial rule would always ‘keep in touch with native thought and feeling’.

Respecting local circumstances would guarantee, at the same time, another principle of administration cherished in the British Empire, one that was already postulated by James and John Stuart Mill: colonial rule ought to adapt to the level of social development of those governed. Not all African societies had reached a similar level of social development. Through the collaboration of local chiefs in colonial administration, Africans’ level of ‘natural evolution’ would be respected. And, of course, their submission would be secured too. At the end of the day, Africans were to obey British command as if they were obeying themselves. Through indirect rule, the aims of civilizing and controlling Africans could be fulfilled simultaneously.

Indirect rule did not entail only a distinction between two interconnected political spheres. It also institutionalized a system of two economic spheres that, as with the former, were intertwined. Africans, Lugard recognized, were mostly agriculturalists. The majority of the African population oriented their work toward subsistence agriculture. Primitive man had no desire for profits or wealth. Here resided the deep roots of the economic stagnation of Africa. However, Lugard believed that once nomadic and savage Africans settled they felt a desire for consumption and capital accumulation. That desire after

320 Ibid., 198.
321 Ibid., 194.
322 Ibid.
323 Ibid., 211.
324 Ibid., 237.
325 Ibid., 238.
326 Ibid.
all, he explained, was intrinsic to human nature. Africans could definitely be moved along a progressive material path.

Land tenure was the most vital institution for the economic advancement of Africa. Maine influenced Lugard’s conception of the emergence of private property over land. For Lugard as for Maine, the development of land tenure ran parallel to the natural evolution of a society. As societies progressed, they recognized private property rights. According to Lugard, land tenure passed through different stages. First, it was possessed in common and belonged to the whole community. At a later stage, land was the property of the family, and the head of the family decided how to allocate it. In the tribal stage, it was the chief who acquired control over land and distributed it according to the needs of the collectivity. Finally, the needs derived from population growth forced societies to treat land as any other tradable commodity.

British rule ought to respect and preserve the various functioning systems of land tenure. As in the political sphere, land would be regulated according to local laws and customary rights under the control of ‘natives’. At the same time, when land started to be owned individually, colonial rule ought to promote a system of small peasant proprietors. Only the latter system, Lugard believed, encouraged those working the land to make improvements in their systems of production. For Lugard, the recipe was the same as the one applied in the political sphere: ‘teach the native to manage his own affairs and better his own methods’.

Besides the primitive economic sphere in which Africans tilled the land and traded according to the slow rhythm of a backward past, another vibrant economic sphere was controlled and administered by the British. The administrative power was, for Lugard, the custodian of the tropics. As such, one of the tasks incumbent upon the British in Africa was the material development of those regions. He was convinced that in the tropics, ‘the surplus population of the white races’ could settle and ‘create new

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327 Lugard explains in a footnote how the discrepancy between the apparent divergent theories of Barriedale Keith and Henry Maine could be reconciled. See Ibid., footnote 1, page 281.
328 Ibid.
329 Ibid., 280.
330 Ibid.
331 Ibid.
332 Ibid., 281.
333 Ibid., 300-301.
334 Ibid., 301.
335 Ibid., 295.
336 Ibid., 506-507.
337 Ibid., 42 and 61.
wealth’. The colonial government ought to foster economic development through scientific improvement and private enterprise. As he recognized, the logic that had animated British interest in Africa was precisely the search for new sources of raw materials:

The tropics produced in abundance a class of raw materials and of foodstuffs which cannot be grown in the temperate zones, and are so vital to the needs of civilized man that they have in very truth become essential to civilization. It was the realization of this fact (as I have said) which led the nations of Europe to compete for the control of the African tropics.

Apart from being a reservoir of raw materials, Africa also offered markets for British manufactured goods.

Because of its economic importance for the world, Africa had to be opened to free trade and the activity of the modern homo economicus (‘the merchant, the miner and the manufacturer’), an economic operator who was entitled to participate in the exploitation of African natural wealth independent of their country of origin. Even the Europeanized African, who for Lugard represented just a fraction of the total population, could turn into homo economicus and operate on an equal footing to the Europeans. According to Lugard, the colonial state ought to intervene as little as possible in the promotion of economic growth. Foreign commercial banks could assist African agricultural proprietors, and transnational corporations were ready to step into West Africa in order to explore ‘every avenue of trade and development’.

Lugard was always careful to present the British mandate to develop the tropics and their population in humanitarian terms. This demanded, among other things, that the appropriation of natural resources by the British did not result in the dispossession of Africa. Lugard believed that Africa was big enough to accommodate the interests of all actors. Even in the more densely populated regions of West Africa, there was enough land for the locals and even for plantations owned by Europeans which could serve as

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338 Ibid.
339 Lugard underlined the importance of scientific education in the colonies.
340 Ibid., 43.
341 Ibid.
342 Ibid., 61.
343 Ibid., 60.
344 Ibid., 86.
345 Ibid., 499.
an example of improved agriculture. The situation was different in the more sparsely populated East Africa. In those ample territories, British citizens could settle at will.

The same principle guided the concession of mining licenses. Foreigners could gain access to the minerals that were not used by the locals. In principle, locals could keep their mineral customary rights and participate in the profits derived from the exploitation of the mineral wealth of Africa. But in practice, only European private enterprises had enough capital for the investment required for the prospection and machineries needed to exploit minerals. So, as in the case of land, the fact that Africans were not disposed did not mean that they had equal opportunities. In the advanced economic sphere only Europeans and a few Europeanized Africans had the capital needed for industrial mining and industrial agriculture, activities conducive to the accumulation of wealth.

The alleged economic inequality that the colonial system produced was most manifest in terms of trade. Africa exported raw materials and imported industrial articles from Europe. Lugard was aware of the allegation that, because of unbalanced terms of trade, British rule in Africa was impoverishing Africans. In response to this accusation, Lugard defended that British rule ought not to deter the industrial capacity of Africans; on the contrary, it ought to encourage it. Lugard believed that the eventual industrialization of Africa was not detrimental to Britain. Once African industry was able to produce basic and cheap articles, Great Britain could concentrate on more refined products and the very technology required by industrialization. That way, the terms of trade would still work in favor of the metropolis. For Lugard the real problem was not the British predisposition to underdevelop Africa but, actually, the fact that Africa was not yet ripe for industrialization.

Lack of efficient transport and the retrograde condition of its populations were inimical to economic progress. Because the African population could not take upon itself the burdensome task of exploiting the natural wealth of the continent, Europeans ought to assist in this collective endeavor, reaping in return generous profits for their generous assistance.

346 Ibid., 295, 332 and 508.
347 Ibid., 348.
348 Ibid.
349 Ibid.
350 Ibid., 509.
351 Ibid., 515.
352 Ibid., 510.
353 Ibid.
International law and imperialism in the late nineteenth century: creating a global space for the homo economicus

Despite important contextual differences with previous periods, the idea of Western pre-eminence in mastering nature and its cosmopolitan duty to transform wilderness into civilization survived as one of the main rationales for Western imperialism in late nineteenth century. Authors such as Westlake, Fiore, and Lawrence directly or indirectly acknowledged the importance of extending Western economic activities to the non-European world as an instrument to exploit vacant natural resources, with the purpose of bolstering universal progress and civilization. As late as the second decade of the twentieth century Lord Lugard clearly upheld this cosmopolitan vision. What is more, he argued that the whole civilized community had consensually endorsed the mission to improve the world’s unproductive resources. In his own words: ‘the civilized nations have at least recognized that … the abounding wealth of the tropical regions of the earth must be developed and use for the benefit of mankind.’

Africa was the new geographical scenario of world history that housed the old battle between the natural and the social spheres. Through empire and civilization all kinds of benefits could be obtained by taming and exploiting African wilderness.

For Lugard, that mission rested on the shoulders of Western industrial and civilized nations. But how could that mandate be reconciled with the fact that underproductive regions were populated by human communities to whom those resources in theory belonged? How could external actors decide where, why, and how to exploit nature without the consent of the locals? At the turn of the century the old answer to these questions had not entirely changed. As had historically happened, the importance of the mission to exploit wild nature was such that it trumped the interest of the human communities that populated the tropics. Lugard legitimized that displacement using an argument with clear Vattelian undertones. He first described the tropics as ‘the heritage of mankind’. Then he declared that the ‘races’ who lived in the tropical world could not place restrictions on the use of their natural wealth in regard to ‘those who need them’. Those in need were, of course, the colonial powers, or as Lugard called them the ‘custodians of civilization’. Africans, Lugard believed, were not yet ready to entirely conquer nature and ascend over it. In order to do so, they needed the guidance of imperial powers.

354 Lugard, The Dual Mandate, Part I Ch I 18.
355 Ibid., Ch III 60.
356 Ibid., 61.
357 Ibid.
But the need for foreign intervention did not mean that Africans ought to be dispossessed, of course. There was enough wealth for everyone. Indirect rule gave a practical answer to the need for accommodating the interests of African peoples and Western economic actors. In Africa, indirect rule helped create a two-fold political and legal sphere: one in which African peoples—under the tutelage of the administering power—managed their own affairs and applied their ancient customs, and another entirely regulated by the Western government administering the area. Yet this separation also entailed a division of economic spheres. On the one hand, there was a sphere reserved for the backward local population who could carry out their productive activities for subsistence. On the other hand, there was a sphere of advanced economic activity that allowed the *homo economicus* to exploit the abundant wealth of the tropics and, for that matter, of any wild natural frontier in order to foster global economic growth. The product of the tropics enriched global markets and contributed to keep global commerce and capitalism running.

This economic division of two spheres that somehow followed the boundaries between civilized and uncivilized human communities, as conceptually demarcated by the Mills, found new ideological ammunition in the idea of evolution and the writings of Henry Maine. Reassured by Maine’s divide between primitive or ancient and modern or progressive societies, at the top sat the *homo economicus*, an individual disaggregated from the mass of the group who had contracts—the most progressive legal instruments—at his or her disposal. From primitive and tyrannical familial and communal units operating under collective institutional arrangements and systems of production emerged the Western economic man, armed with legal equipment and a set of legal institutions of a private nature that allowed him to amass and enjoy unlimited wealth with exclusivity. That was the progressive movement that Maine had aptly captured in the opposition of status and contract.

But this line of action faced a major obstacle. Naturally, as a particular group of individuals—an international capitalist elite—appropriated the Earth’s natural resources, a large numbers of people would lose those recourses and the material benefits that they reported. But social inequality was invisible to theories of evolution such as Maine’s. For him, while group and communal property represented backwardness, individualism and modern economic life opened a window of opportunity for continued social amelioration. Contracts provided a legal instrument to articulate a particular vocabulary that guaranteed the improvement of the *homo economicus*’ boundless life. Importantly, they created the legal basis for the privatization of natural resources and of all that humans produced out of them, together with the possibility of transforming private goods into commodities and exchanging them in the market.
Transforming nature into capital was the ultimate source of material wealth. The fantasy that humans ‘ultimately’ owned nature helped in building simultaneous empires of wealth and misery. It also provided an incentive to blindly destroy the ecological systems that supported human life.

The individual enjoyment of a private sphere of merchandisable natural and artificial goods was cemented by the fact that, for Maine and other jurists such as Lawrence, political authority in its progressive form consisted in the exercise of power over a ‘limited portion of the Earth’. Importantly, Maine provided a historically grounded scientific explanation of the origin of the modern conception of sovereignty. The primitive conception of sovereignty based on personal ties, Maine argued, was transfigured in modern societies into a territorial one. As ancient families and larger patriarchal groups disintegrated into the individuals that composed modern states, sovereignty shifted from power over people to power over a definite portion of the Earth.

This modern idea of a state’s territorial sovereignty was no neutral umbrella with the capacity to accommodate different understandings of political authority, different kinds of normativity, and varied worldviews. Its progressive nature came from the fact that sovereigns in modern societies were continuously legislating in order to promote social progress. Because of this teleological validation, the production of positive norms to regulate society was considered a benchmark of modernity, a vehicle for progress. This activity in turn was associated with the continuous improvement of standards of living in modern Western economies. Territorial sovereignty assured that within a specific portion of land the sovereign could enact legislation that stimulated material production.

The Earth was no longer the one that imposed limits to and conditions on the progressive lifestyles of the modern citizens of nation-states. The individual became the unit of a political system that had the prerogative of enacting rules that allowed him, in conjunction with many other units operating under the same lucrative principles, to claim an absolute power over different parts of ecosystems. The existence of a market system that rewarded this process of exploitation of natural habitats stimulated and reinforced the very private institutions that enabled ‘modern life’ and progress.

One of the progressive instruments at the disposal of the *homo economicus* was the right to privatize nature and transform it into an individual article of property. It was a right with an old pedigree in Western legal thinking. It had been associated by European intellectuals during the sixteenth and seventeenth century with God’s mandate to people the Earth and tame it. At the end of the eighteenth century,

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conjectural history situated it as part of the progressive movement from backward productive activities such as hunting and pastoralism to activities conducive to social amelioration such as agriculture and commerce. In order to create affluence, trade and agriculture had to be carried out under a regime of private property.

The association of private property with social progress and Western civilization carried its day during the nineteenth century. Maine, for example, linked the advancement in civilization to the individualization of property in land. For Maine, trade and private property were not only conductive to civilization: they were the distinguishable legal benchmarks of modernity. In Maine’s legal jargon, they assured the possibility of societies moving from status to contract. Significantly, they also allowed the commodification and marketization of nature. A possibility, to which philosophical ideas of progress linked to human mastery over nature operated on a global scale through a cosmopolitan imperial mission, conferred irresistible force.

At the end of the nineteenth century, the civilizational benefits of private property had been firmly established as unquestionable truth. In one of the most important legal treatises of the century, The Elements of Jurisprudence, the British jurist Thomas Erskine Holland (1835-1926) still associated the right to private property with an ‘advanced state of society’. Similarly, the capacity of individuals to enjoy an absolute power over ‘a wide circle of matter’ constituted for Holland a ‘great advance in civilization’. For the Italian jurist Fiore, private property was one of the universal rights of human beings. That claim had enormous implications. As Fiore explained, every human being could ‘claim such a right all over the world, demand respect for them and enjoy them in every country’. As Fiore formulated it, the legal sphere of protection of the private property of the homo economicus had acquired planetary dimensions.

In the extension of the homo economicus’ global economic sphere of influence, trade nicely complemented private property. Once privately owned, different natural elements of ecosystems could be transformed into commodities and exchanged for a monetary value. Trade, as much as private property,

361 Maine, Lectures, Lecture V 126.
362 Maine affirmed that: ‘the view of land as merchantable property, exchangeable like a horse or an ox, seems to be not only modern but even now distinctively Western.’ Maine, The Effects, 28.
364 Ibid., 123 and 132.
365 Fiore, International Law Codified, Ch II 41.
366 Ibid.
had had a positive ring since its inclusion in the law of nations. Already Vitoria enshrined commerce as a cosmopolitan instrument for the natural partnership and communication of humanity. The cosmopolitan allure of trade came partly from the widespread idea that as different regions of the world had different natural endowments, commerce had the potential to benefit everybody. In theory, trade was the rising tide that lifted all boats. Its contribution to the creation of wealth and prosperity was not the only appeal of trade. For centuries, it had also been related to the promotion of peaceful international relations. Commonwealths that engaged in beneficial trading relations would naturally have less reasons to fight one another.

In the nineteenth century the positive aspects of trade were conspicuously emphasized. International lawyers were some of those that ascribed to the defense of trade. Again, a figure of the stature of Maine believed in the existence of a solid bond between civilization and commerce, characterizing both as part and parcel of the law of nations.367 The views of these authors were a reflection of the British cosmopolitan aspiration to universal peace and progress through free trade.368 When weighing the relevance of trade, all British international lawyers emphasized its cosmopolitan dimension. For Levi, for example, trade was together with religion the best vehicle to achieve justice and peace in the international realm. As material progress disseminated in the world so did commerce, ‘spreading its wings and extending the blessings of plenty and of peace’.369

At the end of the century international lawyers often resorted to a sociological explanation of international law.370 This particular branch of law was the result of a need to regulate the factual existence of a community: the international community of nations. This community was found to be the result of growing interdependence between nations. Modern states were knitted with one another for several reasons. For authors such as Westlake, Lawrence, and Oppenheim, one of the utmost important factors that encouraged bonding between modern states was the increase in commercial relations.371

Commerce was one of the most progressive forces of Western civilization and the modern world. Lawrence was a vocal exponent for the cosmopolitan blend of commerce and civilization. He referred to

367 Maine, International Law, Lecture II 33.
370 Koskenniemi sees the jurists of the Institut de droit international ‘as amateur sociologists’. See Koskenniemi, The Gentle Civilizer, 95.
371 See Maine, International Law, Westlake, Chapters on the Principles, Ch I 6; Lawrence, The Principles, Part I Ch I §3 3; Oppenheim, International Law, Vol I Ch I §7 11.
commerce, democracy, and Christianity (in that order) as the three main drivers of modernity.\footnote{Lawrence, ‘The Evolutions of Peace’ 240, as cited in Sylvest, ‘The Foundations’, 57.} This was a short version of Levi’s slightly larger list, which included ‘Civilization, Religion, Commerce and Science’.\footnote{Levi, The Law of Nature, Preface vii (capitals in the original).} Trade was like a flower that carried within it the seeds of a better international order. It had the potential to alleviate all evils and bringing the good life for all of mankind. As Levi explained: ‘It is commerce which brings nations into mutual contacts, which enlarges their resources, administers to individual comfort, promotes the prosperity, and softens the manners of peoples.’\footnote{Ibid., Ch IV Section II 100.}

Importantly, civilization, commerce, international law, and the international community were all tied together. For Maine, one of the elements that formed part of international law was the ‘growth of civilization and commerce’.\footnote{Maine, International Law, Lecture II 33.} Polson had also defined the law of nature as the outgrowth of civilization, that is, a state in which nations recognized the positive effects of trade.\footnote{Polson, Principles, Section II §1 14.} For Woolsey trade, civilization, and the law of nations were equally connected, but in a different sense. Commerce helped the law of nations take its first steps, until the advance of civilization strengthened the moral ideas of the time and international regulations became more robust.\footnote{Woolsey, Introduction to the Study, §6 6.} And Phillimore remarked that the principles of international law applied with greater precision in the regulation of trade between Christian nations.\footnote{Phillimore, Commentaries, Part I Ch III §XXXII 61.} Fiore included international trade together with private property as one of the basic human rights that could be exercised by humans everywhere.\footnote{Fiore, International LawCodified, Ch II 40.}

It was precisely because of their progressive character that it seemed natural for trade and private property to be recognized as human rights enforceable worldwide. Accordingly, international lawyers defended the extension of the rights of private property and trade overseas. It was of outmost importance for the promotion of progress and civilization that the sphere of action of the \textit{homo economicus} stretched to the farthest corners of the globe. The Earth ought to be an unrestricted economic space where modern individuals could freely operate.

This belief provided an invaluable twofold source of legitimization for imperial rule. One of the criteria whereby the primitive communities of Africa and Asia were distinguished from civilized communities was precisely their incapacity to provide an unencumbered sphere of legal protection for the \textit{homo economicus}. Maine’s distinction between primitive and modern nations was important in this regard. The
modern conception of territorial sovereignty meant exactly the existence of a government who could enact legislations that protected and sponsored a legal sphere where contracts of an economic and individualized nature could take place. That was the sphere inhabited by the unencumbered *homo economicus*. By contrast, primitive communities did not have this kind of legislation and lived by the customs necessary to regulate a backward material life. Of these two kinds of political communities only the first counted as a sovereign state recognized by international law, a state that could promote economic growth and prosperity. That is why exporting this kind of political formation to the most backward regions of the non-European world through imperial rule was considered indispensable for the spreading of civilization.

In this sense, Westlake linked civilization with the capacity to govern. The decisive test of that capacity was precisely the recognition and protection of the rights of individuals who belonged to the society of civilized nations. Europeans ought to be able to enjoy the ‘complex life’ to which they were used to in their own countries everywhere in the world. Demanding such treatment toward foreigners seemed fair because that was precisely the kind of protection that other civilized states offered. Government was also important because of the possibility of signing treaties to regulate modern life. When a modern and civilized government was in place, ‘[t]he states which are members of our international society’ concluded ‘treaties with it as to the especial position to be allowed to their subjects in its territory’. These treaties dealt mainly with ‘custom duties and the regulation of trade’.

The capacity to recognize the rights of trade and private property and sign treaties to promote commerce allowed a dividing line to be drawn between semi-civilized nations and uncivilized populations. Some ‘Asiatic empires’, Westlake recognized, were able to assure the enjoyment of European’s complex life abroad. But ‘most of the populations with whom Europeans had come into contact in America and Africa’ did not have a government capable of such deeds, a fact that paved the way for imperial rule.

Paradoxically, once imperial rule was in place, Westlake failed to apply the high standard of protection of rights he had come up with, to the colonial population. Civilized states could colonize certain regions of the world for the reason that there was a lack of a political community able to guarantee the rights of their subjects. But once they were the rulers, colonial powers could deny rights to their new subjects (the

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380 Westlake, *Chapters on the Principles*, Ch IX 141.
381 Ibid., Ch VII 101-102.
382 Ibid., Ch IX 142 (emphasis added).
383 Ibid.
384 Ibid., Ch IX 142.
absence of which was the very rationale for their intervention) at their discretion. According to him, international law ‘leaves the treatment of the natives to the conscience of the state to which the sovereignty is awarded’. 385

A similar line of inquiry was adopted by Edward Hall in the 1895 edition of his treatise on international law. For him, the standard of civilization was related to ‘the existence in almost all states of a municipal law, consonant with modern European ideas’ which granted foreigners the possibility of obtaining ‘criminal and civil justice with a tolerable approach to equality as between themselves and the subjects of the state’. 386 Outside the sphere of European civilization things worked differently. When states could not give foreigners these rights because of ‘the imperfection of its civilization’ or because its laws were founded on ideas ‘alien to those of the European peoples’, civilized states were free to condition the admission of outsiders to the European family of nations ‘on special provisions being made to safeguard the person and property of their subjects’. 387

So, the degree of civilization of a particular state was often related to its capacity to guarantee the enjoyment of the private rights of Europeans, especially the right to private property and commerce. 388 Lorimer put it bluntly, referring to the conquest of Algeria by France, that he was sure that ‘had Algeria come to respect the rights of life and property, its history would have not permanently deprived it of the right to recognition’. 389 Civilized states were those that were able to protect the sacrosanct legal institutions that guaranteed the unrestrained economic activities of European operators. In this sense, the Final Act of the Berlin Conference imposed the duty of exercising authority in the lands occupied by Western nations. One of the aspects of that authority was the capacity to protect ‘freedom of trade’. 390 In addition, Article 6 of the Final Act stated that the private property of all those implicated in the colonization of Africa such as ‘Christian missionaries, scientists, and explorers’ shall receive ‘especial protection’. 391

Building sound political systems with the proper legal institutions that facilitated the life of the homo economicus was one of the animating forces of imperial rule in Africa and Asia. Moreover, the creation of that sphere entailed the transfer of innumerable natural resources into the hands of the colonists. This

385 Ibid., Ch IX 143. A very similar formulation can be found on page 136. 
386 Hall, A Treatise, Part I Ch II 55. 
387 Ibid. As Hall demonstrated in an extensive footnote, this had been the case of Turkey. Ibid., 55-56. 
388 See also Lorimer, The Institutes, 161. 
389 Ibid. 
390 General Act of the Berlin Conference of 1885-1886, February 26, 1885, Ch VI, article XXXV. 
391 Ibid., Ch I, article VI.
was so because the absence of institutional arrangements and legal norms conductive to the exploitation of nature in the first place logically indicated that nature had not historically been sufficiently exploited. Only the deployment of private legal entitlements assured that natural resources were efficiently utilized. Even if Africans or Asians had for millennia worked their territories before European colonialism, the degree of exploitation in the tropics did not redound in the benefit of the whole of humanity. This is the sense in which Lugard defined the tropics as the heritage of humanity and Westlake declared the preeminent access of the white race to natural resources when there were vacant land minerals and underdeveloped commerce.392

Africans could not extract the wealth of their subsoil; neither could they create plantation agriculture for export. This lack explained the need for imperial administration. For Lugard, one of the fundamental goals of the British mandate in Africa was to foster commerce, improve communications, ‘and to protect the interests of merchants and others who are engaged in the development of its commercial and mineral resources’.393 In the same line, Lindley observed that mines and minerals belonged to the colonial government ‘both in land granted to settlers and others and in lands owned or reserved to the natives’.394 Lugard concurred. In Africa, dispossession did not ‘involve injustice to the natives who themselves were not in a position to exploit the minerals’.395

If Africa was to progress, so Western policy makers and jurists thought, commerce had to be externally introduced in the continent. Trade was officially sanctioned at the Berlin Conference where European powers gathered to arrange the partitioning of Africa, with one of the main objectives of the conference being the preservation of the freedom to trade in the Congo and the Niger.396 During the conference, trade was not presented exclusively as beneficial for Europe, but also as a generous effort on the part of European nations to improve the living conditions of Africans. According to Bismarck, ‘all the Governments invited share the wish to bring the natives of Africa within the pale of civilization by opening up the interior of the continent to commerce’.397

392 See Lugard, The Dual Mandate, Ch III 60; Westlake, Chapters on the Principles, Ch IX 142.
393 Lugard, The Dual Mandate, Ch V 94.
395 Ibid.
Trade was sanctioned in the legal text adopted at the conclusion of the Conference, which established in its first article that ‘The trade of all nations shall enjoy complete freedom’. But European sovereignty and the right to free trade in Africa entailed responsibilities. Concretely, Western nations committed to ‘the preservation of the native tribes’ and to ‘the improvement of the conditions of their moral and material well-being’. The duty of civilized states to help the amelioration of African populations was related to the mandate of civilization.

But not all international lawyers uncritically adhered to the allegedly progressive creed of trade in the colonies. Some French international lawyers, like Charles Salomon (1862-1936), were critical of imperial justifications based on commerce. For them, the supposed European altruism in spreading civilization cloaked a clear economic interest. So Salomon, for example, denounced the hypocrisy of the language of civilization as a mechanism for the mere advance of European commerce. Gaston Jezé (1869-1953) also criticized the exploitative practices of private capital. Notwithstanding their criticisms, neither Salomon nor Jezé doubted the convenience of European rule over less developed societies.

The thought that Western imperialism was inspired by selfish economic motives casted a dark shadow on the humanitarianism characteristic of late-nineteenth century internationalism. The extension of the sphere of the *homo economicus* could not be justified exclusively based on the economic benefit of Western nations. Otherwise imperialism seemed, in principle, extremely one-sided. So, without being critical of trade, British international lawyers would have agreed with Jezé and Solomon that civilization had to be introduced in primitive societies for the benefit of the latter.

The legitimation of Western economic and political hegemony in the colonies was predicated on the West’s capacity to lift the colonized. In fact, even the Berlin Conference supposedly had a higher aspiration than the mere division of African riches between Western colonial states: it also included a humane desire to elevate lower races from material backwardness. According to the final text of Berlin, ‘instructing the natives and bringing home to them the blessings of civilization’ was one of the primary objectives of European colonialism. The Swiss lawyer Joseph Hornung (1822-1884) clearly formulated this aspiration. For him, the ‘hegemony and trusteeship of the strong’ ought to be carried out ‘in the interest of the weak and in view of their full future emancipation’.

399 Ibid., Ch I, article 6.
401 General Act of the Berlin Conference of 1885-1886, February 26, 1885, Ch I, article 6.
The extension of a modern economic sphere and the transfer of natural resources to the Western *homo economicus* operated in a similar way as the political subjugation of colonial populations. European economic preeminence and hegemony in the exploitation of natural resources was only a necessary first step due to the incapacity of the locals. But eventually, so international lawyers and colonial administrators thought, the colonized were to progress in their political and economic capacity.

It was also relatively easy to circumvent the criticism that colonial trade served only Western economic interests. Because of its cosmopolitan ring, it was almost an axiomatic truth that trade, after all, benefited everyone. But that was easier assumed or even stated than demonstrated. International lawyers failed to clarify how the delineation of two spheres of economic life—one retrograde, the other progressive—was exactly going to help in improving Africans’ standard of living. How was the Western appropriation and exploitation of parts of Africa’s natural wealth going to help Africans achieve a better life?

Lugard was perhaps the one that came most close to providing a practical answer to this question. He maintained that the two spheres of material life in the colonies ought to cooperate with one another—ought to communicate—so the advanced sphere would push the ‘native economic sphere’ forward. He was also convinced that the colonial exploitation of the tropics could benefit the locals by effect of international trade. Europeans imported natural products from the tropics that could later be exported as manufactured ‘articles for the use and comfort’ of tropical populations. This affirmation, however, did not explain how exactly the bulk of the colonial population, who derived their profit from an economic sphere of material production oriented toward subsistence, could have the capital to purchase Western industrial products. All but a tiny minority of Africans were cut off from the natural wealth that the continent had in abundance. Only African economic elite, closely tied to the interests of imperial powers, had a real chance to improve their condition. As Western merchants, businesspersons, and their African allies monopolized the main natural resources and commercial channels of the continent, imperial rule failed to become an instrument for the general improvement of living conditions in Africa. What is more, it actually became the instrument that pushed many Africans to harsh conditions of labor, and still many more toward a kind of life whose conditions were far worse than they had ever experienced.

The contrast between the humanitarian rhetoric that international lawyers exhibited in their treatises on international law and that could be found in the Final Act of the Berlin Conference and the cruelty that often accompanied European commercial expansion in Africa was evident in the Congo. Contrary to what was stated and regulated in Berlin, King Leopold established a commercial monopoly over trade in the

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Congo and instituted an unparalleled regime of cruelty and terror. There were some critical voices that stood against Leopold’s practices. However, this criticism did not have to do with the fact that he had established a commercial monopoly at the exclusion of the inhabitants of the Congo—after all, the British had done pretty much the same in the Niger. That monopoly was consonant with the alleged need for the intervention of the *homo economicus* to help alleviate African backwardness. The main problem was that Leopold’s exploitative practices had gone too far, dispossessing and terrorizing the Congolese.

Decades after Leopold policies in the Congo were introduced, the British Foreign Office and especially the Congo Reform Association started to press for change, urging a return to the spirit of Berlin. The solution was to hand in the territory to the Belgian state, which soon managed to assure free trade and protect the Congolese. Nevertheless, the happy victory of Western humanitarianism had a blind spot. One of the objectives of the Congo Reform Association (which was dropped at the end) was left aside from the package of reform: Africans were still not permitted to own land in their own territory.

The mission to create a worldwide institutional framework for the unfettered reign of the *homo economicus* and the export of the very economic activities—such as industrial agriculture and industrial mining—that those institutions facilitated were an integral part of the civilizing mission in African and ‘backward’ Asiatic societies. It also served to make a distinction between various non-European societies: whereas uncivilized societies were considered to lack the conceptual and institutional infrastructure that modern economic life required, it was believed that semi-civilized states were able to provide them, at least to a certain extent. International lawyers acknowledged that semi-peripheral states such as the Ottoman Empire, Japan, and China were almost fully civilized, or were at least in possession of a particular civilization. This more lenient judgment of Asian states was partly based on the fact that those societies, not unlike European nations, were commercial societies.

In the most advanced non-European states, Western nations did not need to directly undertake the exploitation of underutilized natural resources. Those societies used the concept of private property and

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405 Ibid.
406 See supra Chapter 1, footnote 299.
408 International lawyers’ doubts in regard to Asian societies might be the consequence of ‘a tradition of European thought and practice that held the law of nations to apply to all commercial states’. Pitts, ‘Boundaries of Victorian International Law’, 70. Arguably, that tradition of equality functioned as long as Asian societies were able to keep Europeans off their territories. Once Europe was able to dominate Asian societies by armed force, equality was no longer needed. Still, international lawyers held Asian commercial societies in higher esteem than any other foreign nation. See Lorimer, *The Institutes of the Law*, 218. It is important to notice that Lorimer regards trade as a ground for elevating the consideration of nations which could only otherwise receive partial recognition in international law. Ibid., 218-219.
the economic activity of trade to undertake directly that exploitation. But still, international law demanded that the world was an open space for the Western *homo economicus*. So, semi-peripheral states ought to open their markets and allow the participation of the *homo economicus* in the circulation of wealth that took place in their societies. Western merchants and businessmen had to be allowed to conduct their economic activities everywhere in the world.

The standard that allowed a distinction between different kinds of non-European communities was based on the capacity of non-Western political communities to reciprocate. In Europe, every foreigner could (in theory) enjoy the same rights as the Europeans nationals of each state. Accordingly, European merchants, missionaries, and explorers ought to be able to have access to an impartial application of justice regarding their private economic rights when residing abroad. Several late-nineteenth century lawyers actually recognized that this already happened in the most advanced non-European nations. This was, for example, the reason why Westlake differentiated Asiatic empires from other non-European polities. The same distinction was at work in Oppenheim’s placement of Turkey and Japan within the sphere of international law. Even though both had entered the family of nations, Oppenheim still made a distinction between both nations. He explained that in Turkey foreigners were under the sole jurisdiction of Turkish consuls. This way, the economic interests of the *homo economicus* could not be properly guaranteed. According to Oppenheim, Turkey ought to follow Japan’s modernizing initiatives, which had assured the impartiality of its legal system in the treatment of foreigners.

Lorimer parted ways with the former jurists in his assessment of non-European societies. For him, humanity was divided in three ‘concentric zones’: civilized, barbarous, and savage. Only within the first group were nations able to reciprocate, a capacity that for Lorimer was the definitive criteria for the recognition of membership in the community of civilized nations. For Lorimer, the civilized sphere was composed of Western nations, their settler colonies, and American States. These were the only states that could reciprocate and, thus, had assured their total recognition. So, outside this exclusive sphere, the legal protection required for the ‘progressive’ operations of the *homo economicus*, Lorimer argued, could only

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409 Gong, *The Standard of ‘Civilization’*, 64. See also Pitts, ‘Boundaries of Victorian International Law’, 75-76. The importance of reciprocity as a standard for inclusion in international society can be found in Pitts, ‘Boundaries of Victorian International Law’.
410 Westlake, *Chapters on the Principles*, Ch IX 141-142.
412 Ibid., 148.
413 Ibid.

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be guaranteed by the establishment of Western courts in foreign countries.\textsuperscript{415} Therefore, the recognition of extra-territoriality and the establishment of consular jurisdiction became a vital question in European-Asian relations.\textsuperscript{416}

The judgment of whether a handful of non-European nations—namely Turkey, Japan, China, and Siam—were capable of assuring an economic sphere for Western individuals and thus deserving of recognition into the community of states under international law varied among international legal scholars. But what was common among them was basing the admission into the family of nations on the capacity of non-European states to guarantee the freedom of economic action and the private property of foreigners.\textsuperscript{417} The homogenization of legal condition for the economic operation of Western individuals was not always in place even in the most advanced non-European states. So, during the nineteenth century a regime of capitulations was developed in order to assure the extraterritorial jurisdiction of Western powers over its nationals operating abroad. For Fidler, capitulations were ‘a crude form of legal harmonization to facilitate the conduct of international trade and transactions in the early era of global commerce’.\textsuperscript{418} They removed the legal uncertainty and risk incurred by Western merchants, investors, and entrepreneurs when doing business abroad.

Not surprisingly, many nations were unwilling to open themselves to the kind of foreign intrusion demanded by Western nations.\textsuperscript{419} However, their resistance was legally overcome by the imposition of unequal treaties that favored Western interests.\textsuperscript{420} For instance, the Treaty of Nanking of 1842 obliged China to lower its tariff rates and accept extraterritorial jurisdiction.\textsuperscript{421} The fact that unequal treaties were forcibly concluded with countries such as Japan, Siam, the Ottoman Empire, and China—which were regarded as quasi-equals to Western states—evidences the importance for Western powers of assuring private rights and favorable commercial terms for their citizens. The protection of Western rights in

\textsuperscript{415} Lorimer, \textit{The Institutes of the Law}, 217.
\textsuperscript{416} Pitts, ‘Boundaries of Victorian International Law’, 81.
\textsuperscript{417} Georg Schwarzenberger, ‘The Rule of Law and the Disintegration of the International Society’ 33 \textit{The American Journal of International Law} (1939) 56-77, 64.
\textsuperscript{419} Extraterritorial rights to Europeans had been recognized previously by the Ottoman Empire, Japan, China, and Siam, and were generally based on reciprocity. However, the increasing demands of European powers and their superior military powered made foreign states reluctant to make new concessions. This is why in those cases Europe resorted to war. Gong, \textit{The Standard of ‘Civilization’}, 67-68.
\textsuperscript{420} Ibid., 65.
\textsuperscript{421} Ibid., 67.
international law and its articulation as a criterion to measure non-European civilization hid imperial commercial ambitions.\footnote{422}

States that could not protect the rights of foreigners were labeled uncivilized. But even those which could guarantee them but did not want to do so were forced—violently, if necessary—to comply. Therefore, the ultimate criterion for Western intervention was not the capacity of a state to grant rights to foreigners. That was a mere façade. What was decisive was the willingness of a particular nation to let foreigners take a piece of the cake of its natural wealth.\footnote{423}

During the second part of the nineteenth century, the U.S and Great Britain had 28 million square kilometers at their disposal. They could directly, or by way of its settler populations, undertake the exploitation of the ecosystems in those territories. By the end of the century a selected club of Western nations acquired another 30 million square kilometers in Africa. The idea that the ‘Dark Continent’ needed to be opened to the light of Western economic initiative animated African colonization. Due to its alleged backwardness, the direct administration of Africa was an imperative necessity. Almost half of the surface of the Earth had been appropriated by Western powers based on a standard of environmental exploitation.

But at the turn of the century, as Western industrial countries looked at the rest of the world from the pinnacle of their power, the standard of environmental exploitation stopped short of being applicable outside Africa and the most backward Asian societies. In between civilization and primitiveness were those non-European polities which were trying to modernize and had already committed to exploiting their own resources. What was necessary, then, was that the individuals of the most powerful Western industrial nations could participate in the exploitation of ecosystems everywhere in the world, and that their economic activity could proceed in a harmonized legal universe of appropriable natural resources. That way global capitalism, impersonated in the progressive activity of the \textit{homo economicus}, could endlessly transform nature into a civilized realm and a modern space of power and plenty.

\textit{Concluding remarks}

Since the beginning of the nineteenth century, Western intellectuals had studied with a sense of perplexity and admiration the economic and social trajectories of the most advanced Western nations.

\footnote{422}{The hypocrisy of this interpretation of civilization and its application to Asian commercial states did not go unnoticed at the time, as Jennifer Pitts has shown. See Pitts, ‘Boundaries of Victorian International Law’, 78-79.}

\footnote{423}{Ibid.}
Industrialization and science had brought about sweeping transformations in all spheres of life. Industrialization, not without its negative trends of pollution and suffering for the labor class, had nevertheless contributed to the general amelioration of living conditions in the U.S. and a few European countries. Moreover, progress seemed to be unlimited and quicker than ever before. Changes that had previously taken centuries were now happening in the span of decades. When compared to the rest of the world it was not only clear that industrialized Western societies were superior to non-European ones, but also that their superiority kept growing as those societies progressed. One of the main elements of their superiority consisted of making possible the old religious aspiration that Prince Albert had pertinently expressed during the Great Exhibition: that of modeling the Earth in their own image (which, in practice, meant according to their own economic interests).

The old division between civilized and uncivilized societies based merely on the superiority of different elements of Western nations, which conjectural history had aptly captured, had to be rethought during the second half of the nineteenth century. World societies could no longer be ordered merely according to divergent social trajectories on their path toward progress. There were, of course, differences between the degrees of progress of different non-European communities. But the most important social division worldwide was now articulated around two clear-cut camps. Already in the beginning of the nineteenth century James and John Stuart Mill had noticed that while European societies kept progressing, most of the world outside Europe had stagnated. Progressive societies carried within themselves the seeds of continuous and unlimited progress. The free movement of capital, industrialization, and innovation created a virtuous circle of economic growth and social improvement. At the other end of the spectrum were non-progressive societies; static and retrograde political units that could not be moved forward from within.

Despite these differences, one still had to concede that some non-Europeans were more advanced than others. The peoples of Africa, for example, excelled when compared Australian savages. They had a notion of private property and practiced agriculture and commerce. But mirrored against the image of industrial Europe they were still lagging far behind. Besides, the task of catching up with the West was not an easy one. As non-Europeans managed to meet old standards of civilization, new ones constantly appeared, and the gap between the backward and the progressive widened again and again. For the agriculturalist Africans, statehood became the new horizon of progress and civilization. And once they eventually formed independent states the standard evolved again—be it development, respect for human rights, or good governance, Non-European polities have historically been found wanting by universal
standards of social amelioration. The power to define what progress meant was the power to shape and remodel societies according to one’s own ideology, interventionist agenda, and set of priorities. In other words, the priorities that counted were those of the ones with the power to define what was universally appropriate and desirable.

The vernacular of evolution was vital in providing a vocabulary that could aptly capture the new set of differences that at the end of the nineteenth century informed the hierarchical division of the world. The gap between advanced and backward world societies had grown into a gulf that could be better expressed through the distinction between pre-modern/primitive/ancient societies and modern ones. Modernity was the reign of progress.

Evolution also resolved another of the challenges posed by the growing social gap between modern and pre-modern societies. During the seventeenth and eighteenth century, when social differences between Europeans and non-Europeans were supposedly related only to their productive and institutional systems, it was somehow feasible to bridge the gap and bring civilization to uncivilized non-Europeans by changing those systems. At the turn of the twentieth century, civilized modernity was out of reach for primitive societies. Forcing pre-modern peoples to accept ideas, practices, and institutions that as Lugar recognized were ‘a thousand years in advance’ of their ‘mental and social equipment’ was like forcing a person to change her/his very bone structure. For this reason, imposing civilization was meant to create pain, turmoil, and resistance.

Intellectuals like Maine and colonial figures like Lugard found a way through this challenge. They suggested that societies ought to evolve from pre-modern to modern forms at a slow pace. Mere contact with superior forms spontaneously disintegrated primitive societies and pushed them onto the path toward progress. Indirect rule was the institutional response that the British envisaged in order to carry their civilizing mission without dislocating colonial societies. To the extent possible, pre-colonial societies ought to be left to themselves. Their governmental structures, customs, and productive systems ought to be respected. This seemingly passive attitude was in reality a well-engineered intervention in order to hold power tightly while engendering minimal resistance.

But respect for the pre-modern economic sphere of the colonized populations clashed with the cosmopolitan mandate of exploiting the world’s virgin natural frontiers. A constant flow of raw materials from the colonies was indispensable in keeping up the ever-growing expansion of the international capitalist economy. In response to this demand, Lugard explained that one of the main functions of colonial administration was to promote the economic development of the colonies. In order to reconcile
that mission with respect for the backward economy of colonized populations, the British demarcated a parallel modern economic space in the colonies, one occupied by the Western \textit{homo economicus} in which the modern rights of a private economic nature could be used in order to exploit vacant natural resources.

The imperialist promotion of the \textit{homo economicus} was facilitated by the scientific language of international law. This, of course, was not a new development particular to the nineteenth century. Since the first Spanish colonists appropriated Latin American ecosystems and traded the natural resources of the continent, Spanish commentators had recognized the international legal validity of private property rights, international trade, and a right to occupy unexploited resources. In the following centuries other European jurists and intellectuals similarly legitimized the economic activities of the Dutch in the East Indies and the British in the West Indies and North America. Since the day European imperialism started in \textit{Hispaniola}, the \textit{homo economicus} was the private face of state imperialism. At different times that face was more visible. All in all, public and private power were two sides of the same coin, two aspects of the same phenomenon. And while international law was generally associated with the former, it also provided the legal architecture and \textit{raison d'être} for the private appropriation of the world.

But during the second half of the nineteenth century the \textit{homo economicus} was new in a certain sense, at least in contrast to the way colonization had operated during the first half of the century. Settler colonialism did not need the construction of a particular space and set of rules that enabled free capitalist economic activity, because in settler colonies the boundaries of the free space for the \textit{homo economicus} coincided with the very boundaries of the continents settled. The pre-colonial populations were completely cut out of the enjoyment of the natural resources available in those territories. It was only when Westerners could not appropriate whole continents that the existence of regimes of private property rights and free trade became a standard of governance and civilization, its absence validating imperial interventions to guarantee—or rather impose—them. But at the end of the day, even if the way in which it was exercised was different, imperialism provided hegemonic power over the natural resources of non-European territories at the cost of the ecological balance of ecosystems and the well-being of the very populations that depended on them.

The \textit{homo economicus} was no abstraction. Individuals like Leopold II and Cecil Rhodes and families like the Rothschild, who amassed huge fortunes through the appropriation and commercialization of particular non-European natural and mineral resources like rubber, diamonds, and land, or the financing of those international economic ventures, incarnated it. However, not all of the economic actors that operated in the Empire were greedy investors or ruthless empire-builders. Some were humanitarians that
saw no incompatibility in acquiring fortunes from exploiting the resources that backward populations could not use and using part of their gains to uplift the very populations whose resources they had taken. In addition, Western humanitarianism in Africa found its most altruist impulse in the work of charities and missionaries whose mission was, paradoxically, to provide material well-being to those impoverished by the very acts of appropriation of profitable natural resources, the benefits of which they could not reap.

Evolution had closed the full circle of imperialism by providing a novel legitimating vocabulary. It would not be the last. In the mid-twentieth century, after two World Wars ravaged Europe, shattering the European sense of moral superiority, the new global hegemon of the U.S. proclaimed the dawn of a new era: the era of development. This does not mean that development was a completely new term. In the opening pages of *The Dual Mandate* Lugard had already explained that after the Berlin Conference a program of development had been launched in Africa.\(^{424}\) The material development of the tropics was a specific goal of imperialism. Development, the novel terminological expression of progress, would acquire great importance in the twentieth and twenty-first centuries. It became a new vocabulary of progress, one that was particularly palatable in a politically post-colonial world.

\(^{424}\) Ibid., 2.
10 End of Colonialism, End of Story?

The Thesis in a Nutshell

This work has grown out of a conviction that the way in which the history of international law has been generally told is fundamentally incomplete. By and large, nature has been marginal to international legal histories. This is not, of course, the result of bad scholarship. Rather, it is the logical corollary of the fact that legal scholars have only recently started to devote attention to the past of the discipline. Inspired by the need to explore the environmental dimension of international legal historiography, this study has attempted to start mapping the historical relationship between international law and nature. This is a huge intellectual task, so this study is just a first step in that direction.

It is the central argument of this study that the appropriation of non-European nature has been a vital component of the development of international law and that, conversely, international law has played a fundamental role in legitimizing the colonial appropriation of non-European nature. During the colonial era, legal arguments fashioned around the use and exploitation of nature validated a number of imperial interventions in non-European territories that often resulted in environmental degradation and social dislocation.

By legitimizing the appropriation and exploitation of non-European ecosystems, international law was an instrument of empire. It helped Europe and the U.S. gain environmental hegemony over huge portions of the Earth. That hegemony was simultaneously the cornerstone of Western economic prowess and political power and the cause of the impoverishment of non-European peoples who were largely deprived of the enjoyment of the natural wealth available in their surroundings.

The appropriation of non-European nature—land and natural resources—had a twofold dimension. Appropriation needed, on the one hand, a justifying rationale (why to appropriate) and, on the other hand, a series of institutional mechanisms to materialize it (how to appropriate). This second demand was fulfilled by the rights to private property, trade, and occupation. These rights provided the legal vehicle whereby nature could be transformed into an economic entity and, once objectified, appropriated. The application of these rights converted natural elements that functioned together in complex ecosystems
into a series of individualized articles that could be separated from those ecosystems, privately owned, marketized, and transformed into objects of elite or mass consumption. So, the history of international law is also the history of the universalization of legal processes of privatization and commodification of nature in America, Africa, Asia, and Oceania.

The theory of occupation—the idea that after God’s creation there were still certain vacant goods and lands in the world that could be occupied by the first taker—became crucial in elucidating the extent to which non-European nature was appropriable. But in Europe, as elsewhere, there was a lot of unexploited ecosystems, and no one claimed that they were susceptible of appropriation. On what grounds could non-European territories be treated differently? Would not the right to occupy necessarily collide with non-Europeans’ free enjoyment of the natural wealth of their territories? Europeans resolved this paradox by linking the right to occupy in the colonies to the question of non-European social progress. And the evaluation of whether Europeans were advanced was, among other factors, ultimately based on their capacity to exploit nature—that is, to transform supposedly idle natural resources into economic items of civilized life. In time, a standard of environmental exploitation developed, which helped in delimiting the extent of Europeans’ right to appropriate and exploit non-European vacant land and natural wealth.

What Antony Anghie has called the ‘dynamic of difference’—the ideological belief of European intellectuals in the existence of a gap between their superior social condition and the inferior state of non-Europeans—was partly based on the belief that non-Europeans existed in a continuum with nature. Even if approached from contrary ends of the spectrum the colonial natural-social continuum revealed the same gloomy reality. On the one hand, the abject condition of non-Europeans evidenced that they did not have the capacity to work and transform their surroundings, which logically were in a wild condition: backwardness produced wilderness. On the other hand, the assumed wilderness of non-European territories clearly indicated that non-Europeans lacked the capacity to utilize, improve, and make those ecosystems productive: wilderness produced backwardness.

This dynamic of difference created a fertile ground for a redemptive mission. Because, according to representations of non-European nature and people, the social and natural spheres of life had not completely disentangled in the colonies, it was then the European imperial mission to affect that separation—that is, to unravel the social/natural continuum. Therefore, the civilizing mission, which has been identified with the attempt to uplift non-European peoples, needs to be redefined. It was larger than the mere attempt to redeem non-Europeans and upgrade their condition—it was a more thorough,
encompassing, and far reaching project: the project of creating civilization out of wilderness (wild nature and wild people).

Once the civilizing mission was defined in such terms, it was easy to conclude that the most suitable instruments to bring it about were European economic rights. Because of the progressive nature of these instruments, the privatization and commodification of nature could turn wilderness into economic items of progress and transmute half-social/half-natural individuals into civilized economic operators. Nature’s exploitation was the cornerstone of human progress. So it was assumed that once that process was undertaken in the colonies through European superior economic institutions, the static non-European world could finally gain traction, move toward Christianity, civility, civilization, or modernity (the different European vernaculars that had historically captured the idea of progress), and thus enter the realm of progressive history. Unluckily for non-Europeans, the promise receded as it was supposedly approached. This was so because, in practice, imperialism tore down a substantial part of the social texture of non-European societies, creating the very states of destitution and deprivation that it then theorized as an inherent social condition of the colonies to be corrected.

The legitimization of the appropriation of non-European nature by international law, which paved the way for environmental exploitation and human impoverishment, leaves little to celebrate. But while it is tempting to look at the past from a contemporary ecological sensibility and firmly point the finger of blame, a point of caution is needed. Phenomena like acid rain, the thinning of the ozone layer, global warming, desertification, etc., have contributed to raising awareness about the destruction of our natural surroundings. But centuries ago, the world looked rather unexploited, and the conceptual lens with which people looked at it were completely different. So, it feels wrong to judge others by standards they would not even have comprehended.

The past and the present seem incommensurable. Still, despite undeniable and huge differences, it is difficult not to feel that there is a tragic connection with the past. For this reason, it seems pertinent to interrogate into the historical operation of powerful narratives that do not allow humans to wake up from the dream of owning the Earth and feeling superior to other living creatures, be they human or non-human. The point is not to find fault and lay blame, but rather to raise awareness about the multiple ideological layers that have produced and still create a distorted way of perceiving reality and operating in the world. The practical imposition of that distortion on the world through expert analyses, policies, and institutional apparatuses—all increasingly taking place at the international level—have caused and continue to cause enormous suffering. Awareness about the past can illuminate the present and, hopefully, prevent an
actualized tragic trap of repetition. We can only transform what is brought to light, no matter how painful it is to see what we did not want to see.

In order to verify whether the past repeats itself in regard to the narrative that informs the present work, I would like in the following pages to interrogate whether the Western appropriation of non-European nature and its associated environmental hegemony actually ended once Western imperialism was formally dismantled. The remainder of this work thus seeks to open a window of possibility into future research by outlining certain grand schemes directed at non-European nature in the post-colonial era. Concretely, I will focus on and reflect separately upon the discourses of development and conservation in order to ascertain whether certain features of the seemingly far colonial past, as outlined in this study, are still part of our more recent history. A thorough analysis of these discourses clearly surpasses the scope of this work. So, in this final chapter, I will not go farther than the Stockholm Conference (1972), which inaugurated the concept of sustainable development, in itself a huge field of research.

Coda: Development

Development and the inauguration of a new era

On Thursday 20 January 1949, Harry S. Truman gave his inaugural address as newly elected president of the U.S.1 Truman began his speech by emphasizing the various challenges that the U.S. and the world at large faced at that particular historical juncture. In the aftermath of two world wars that had ravaged the Earth and with the start of decolonization looming on the horizon, the world as it was known before the mid-twentieth century was passing away. Thus, it had to be reborn again. Truman’s speech sought to adumbrate the contours of that new era. In this context, U.S. democratic values and free-market capitalism were presented as the right and bright way forward. But, despite the seemingly glaring progressive nature of this path, it was not self-evident at a time when many ex-colonies were ‘advancing toward self-government’2 that the new nations that were to emerge from colonialism were going to choose the option that Truman so fervently cherished. What is more, the U.S. had to face a competing and, according to Truman, misleading philosophy of life: communism, which threatened to attract nations down a wrong and harmful historical path.

2 Ibid., 266.
It was in the context of competing ideologies to reconstruct international life after the Second World War that Truman presented a four-point program of action, intended to shape the future in a way that would be attractive to all nations. That program included adherence and support to the United Nations, a plan for the economic recovery of European nations, and the creation of a collective defense arrangement for the security of the North Atlantic Area. The fourth and final point was a general socio-economic program intended to the ‘improvement and growth of underdeveloped areas’. In this regard, Truman declared that:

We must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. More than half the people of the world are living in conditions approaching misery. Their food is inadequate. They are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas. For the first time in history, humanity possesses the knowledge and the skill to relieve the suffering of these people … I believe that we should make available to peace-loving peoples the benefits of our store of technical knowledge in order to help them realize their aspirations for a better life. And, in cooperation with other nations, we should foster capital investment in areas needing development … The old imperialism—exploitation for foreign profit—has no place in our plans. What we envisage is a program of development based on the concepts of democratic fair-dealing.3

Truman’s fourth point of the address inaugurated the ‘era of development’.4 Even though the threat of communism seemed the most urgent, and hence important, of all the concerns that Truman raised in his address, it was the new program of development that would prove historically more consequential for the vast majority of the world population. Eventually, the West at large embraced development as the right prism for understanding and relating to non-Europeans.

Truman himself believed that, at the time of his renewed presidency, the world was entering into a crucial and new historical period.5 In consequence, his address was seemingly no more than a timely response to the exigencies of the new times. Paradoxically, Truman’s speech contributed to bringing about the very reality to which his speech sought to respond—at least, this was the case with regard to non-European peoples. As Gustavo Esteva has famously put it, ‘underdevelopment began … on 20

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3 Ibid., 266-267.
5 Pahuja, Decolonising International Law, Appendix two 263.
January 1949’. According to Esteva, as a result of Truman’s discourse ‘2 billion people became’ suddenly ‘underdeveloped’. Truman made a diagnosis of the deficiencies that afflicted most non-European societies and prescribed a precise cure. His words configured the very geographical and conceptual deficient entity: the Third World, which his program of action was destined to redeem.

Development, of course, was not a total newcomer. Without using the term, the Final Act of the Berlin Conference had, nonetheless, committed European countries to the improvement of the material well-being of Africans. Years later, in the Dual Mandate Lugard used the word prolifically. He dedicated two whole chapters to dealing with the question of the economic development of British colonies. Similarly, the League of Nations promoted the economic development of the colonies and the welfare of colonized populations.

Even though Lugard and the mandate system laid the first bricks of the contemporary edifice of development, both came short of using the word with the historical specificity that Truman did. The main reason why Truman’s program of development seemed such a novel enterprise was because it consciously distanced itself from imperialism. Both the mandate system and Lugard inserted economic development as one aspect of a more general program of civilization applied to the colonies. For that reason, the world of Lugard and the League did not need underdevelopment. There were other terms available, such as primitive or uncivilized, to help capture and express the retrograde moral and economic condition of non-Europeans before Western imperialism started to correct their historical trajectory. The difference between development and underdevelopment became significant to international life only after the Second World War, in the context of the new institutional reconstruction of the world under the auspices of the United Nations.

‘Truman’s development’ was a much more specific and encompassing historical project because it came about partly as a result of the intersection of two broad historical processes. One of them was the ascension of the U.S. as the new world hegemon in competition with the communist Soviet bloc. The

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7 Ibid.
8 General Act of the Berlin Conference of 1885-1886, February 26, 1885, Chap. I, Article VI.
9 It is interesting that the words ‘development’ and ‘develop’ figured in the three quotes that Lugard inserted in the cover of the book. See Lugard, The Dual Mandate.
10 Anghie, Imperialism, 158-168. Article 22 of the League of Nations proclaimed that the ultimate reason of the Mandate System (what the Covenant referred to as ‘a sacred Trust of civilization) was to procure ‘the wellbeing and development of peoples now yet able to stand by themselves’. League of Nations Covenant, Article 22, [http://avalon.law.yale.edu/20th_century/leagcov.asp/art22, accessed 16 March 2016].
other was the beginning of decolonization. Both were interrelated because communism presented an alternative socio-economic creed that independent nations could embrace.\textsuperscript{12} None other than Lenin had claimed that imperialism was the highest stage of capitalist domination.\textsuperscript{13} So it was vital for the new project of development to disassociate itself from the very beginning from former Western imperialist projects of progress. It was politically savvy to emphasize that development was ‘clean’ from its inception and, although it had nothing to do with the shameful history of European colonialism, it still could deliver the same progressive promise of universal social amelioration.

Despite Truman’s claim that the ‘old imperialism’ had nothing to do with the new project of development, the influence of imperialism filtered into Truman’s discourse in various ways. On the one hand, the distinction between developed and underdeveloped areas seemed to reproduce old colonial hierarchical divisions between Europeans and non-Europeans, such as backward/advanced, civilized/uncivilized, retrograde/progressive, primitive/modern, etc. On the other hand, Truman retained terms that had a clear colonial ring. For example, he characterized the economic life of those who lived in underdeveloped areas as ‘primitive’ and ‘stagnant’. These were terms that authors such as Henry Maine and John Stuart Mill had already used in the nineteenth century to capture non-Europeans’ backwardness.

But still, there were differences between the old and new vocabularies. Truman talked about ‘underdeveloped areas’ but did not use the expression ‘underdeveloped peoples’. And even when he recognized the primitiveness of the peoples that populated those areas, he restricted primitiveness to the economic sphere. The Second World War had destroyed the supposed moral/cultural superiority of the West that was implicit in the language of civilization.\textsuperscript{14} The advanced European nations had shown that even civilized states were capable of committing unimaginable atrocities. For that reason, the moral distance between the savage and the civilized man seemed smaller than ever before. And even if Europeans still felt superior to their colonized populations, it was particularly difficult after the War to base that superiority on moral or cultural grounds.

But renouncing moral superiority did not amount to getting rid of hierarchy as such. Truman showed that the West could still cling to the superior material conditions of life that their societies had attained vis-à-vis non Europeans, which in turn were the result of the application of Western superior scientific

\textsuperscript{12} David Ekbladh, ‘Harry S. Truman, Development Aid, and American Foreign Policy’ in Raymond H. Geselbracht (ed.), \textit{Foreign Aid and the Legacy of Harry S. Truman} (Kirksville, Truman State University Press, 2014) 61-72, 62-64.
\textsuperscript{13} Vladimir I. Lenin, \textit{Imperialism, the Highest Stage of Capitalism} (Moscow, Progress, 1982).
\textsuperscript{14} The Final Act of the Berlin Conference bound European imperial powers to seek ‘the improvement of’ the moral condition of ‘native tribes’. See supra footnote 8.
knowledge. The Marshall plan allowed a prompt recovery of a devastated Europe that only a few decades after the War rejoined the track of economic growth and prosperity. Europe too could enter the development wagon, forget its darkest recent times, and join a utopian program for the reconfiguration of the non-European world which allowed it to retain its preponderant world status. As the hero of the war, the U.S. did not have to face Europe’s moral hesitation. Therefore, it was the perfect candidate to outline the developmental path for the future of the world and take the leadership without remorse.

Development and underdevelopment, as previous imperialist languages, served to identify (or rather re-create) a new gap between Western and non-European societies. As the vernacular of civilization became morally inappropriate and outdated, inferiority was reduced to a socio-economic plane. Once the gap between the superior West and backward non-Europeans was reproduced in socio-economic terms, it was easy to offer development, Western knowledge, science, and economic institutions as the best instruments to close that gap.

In 1949, Truman lay the foundations of the development era. Nevertheless, in the 1960s, as tens of nations from Asia and Africa achieved independence, there was a compelling need to explain in detail how the new independent non-European societies could ascend from underdevelopment to the promised land of development. It was at this crucial juncture that modernization theory came to complete the work commenced by Truman a decade before. It is not a coincidence, perhaps, that the most significant intellectual work of modernization theory, Walt Rostow’s *The Stages of Economic Growth*,15 was published in 1960, the year that 17 sub-Saharan African nations gained independence.

*Modernization theory and the re-appropriation of non-European nature*

Rostow’s manifesto and Truman’s address were born out of the same historical influences and, particularly, the Communist threat.16 In the aftermath of Truman’s inaugural address, U.S. political elites encouraged U.S. social scientists to devise theoretical instruments that would foster U.S. sponsored

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16 This was a purpose that Rostow explicitly recognized, as he subtitled his work ‘a non-Communist manifesto’. See also Ibid., 134.
capitalist development. A staunch anti-communist and a fervent defender of capitalism, Walt Rostow was the perfect candidate for such an enterprise.

Modernization theory was the conceptual response to the need to identify and concretely delineate how underdeveloped nations could climb the social scale in order to attain economic progress. But in order to find the solution to underdevelopment it was vital to identify on what underdevelopment concretely consisted. Truman had hinted that underdevelopment was the result of a primitive and stagnant economic life; but that was a somewhat circular response, as it left unidentified the sources of economic primitiveness.

Rostow began his book by identifying five universal economic categories in which all world societies could be divided. Those five types of societies were (from most backward to most advanced): the traditional society, the preconditions for take-off, the take-off, the drive to maturity, and the age of high mass-consumption. After presenting a universal social classification, Rostow went on identifying the source of backwardness of traditional societies. According to Rostow, the most backward social formation was ‘one … based on pre-Newtonian attitudes toward the physical world’, which, in other words, meant a society in which ‘men’ had not yet realized ‘that the external world was subject to a few knowable laws, and was systematically capable of productive manipulation’. Accordingly, those societies ‘remained untouched or unmoved by man’s new capability for regularly manipulating his environment to his economic advantage’.

Rostow related the underdevelopment of non-European nations to their incapacity to master nature. Those societies had not yet been able to exploit their ‘unused natural resources and methods of production’. Economic advantage and economic growth were the result of humanity’s increasing capacity to exploit vacant/wild nature.

Truman had already indicated in his speech that, with the help of modern science and technology, development was to maximize the utilization of the world’s untapped natural wealth. According to Beard, Truman’s conception of development echoed Bacon’s belief that humanity ought to assert its dominion

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18 Rostow was also famous for contributing to U.S. foreign policy in South East Asia, and particularly for his role in the Vietnam War. For the latter see David Milne, America’s Rasputin: Walt Rostow and the Vietnam War (New York, Hill &Wang, 2008).
20 Ibid., 5.
21 Ibid., 8 and 139.
over nature. This conclusion seems correct in hindsight. Today we are conscious of how environmentally destructive industrialization and modernization have been. However, while Truman presented different elements that could be seen as an invitation to exercise dominion over nature—the importance of science and technology for productivity, the need for better use of natural resources, etc.—he never joined the dots.

That was not the case with Rostow. The Baconian perspective that informed his conception of development was evident in his conviction that development could only take place with the realization that:

Man need not regard his physical environment as virtually a factor given by nature and providence, but as an ordered world which, if rationally understood, can be manipulated in ways which yield productive change and, in one dimension at least, progress.

Rostow anchored human progress to the capacity to perceive nature as an entity that could be rationally understood and manipulated. Nature’s ‘aliveness’ was objectified, turned into an ‘ordered world’, and made malleable to human scientific and technical power. Bacon’s influence (here understood as the belief in the importance of the human domination of nature) is much more visible in Rostow’s ideas than in Truman’s declaration. In Rostow’s modernization theory there is powerful invitation to dominate nature for human profit.

Rostow’s ideas are not only a thing of the past. When in 1990, thirty years after the first edition of his book, Rostow addressed the critique that his model was too general and automatic and in consequence trapped societies in a one-dimensional progressive scheme, he defended the automaticity of his model in at least one way. At the core of the model, he stated, was the transition from a pre-Newtonian way of relating to nature to a post-Newtonian one. This transition occurred, he maintained, when humans understood the laws that governed nature and, hence, were able to manipulate nature to their advantage in a systematic way. For Rostow, the capacity to exploit nature was, in the 1990s as in the 1960s, one

24 Like Truman, Rostow repeatedly underlined the importance of science and technology for modernization. See, for instance, Ibid., 6, 32-33.
25 In fact, Rostow explicitly celebrated Bacon as one of Europe’s foremost scientific figures, equitable to the likes of Newton, Galileo, and da Vinci.
26 Ibid., 173.
of the main drivers of history and, as such, one of the most important interpretative devices for understanding humanity. For Rostow, that capacity was the element that could single-handedly explain the difference between the ‘modern world’ and ‘all previous history’.27

The way in which modernization theory defined social progress and the role given to nature in it resembled in important ways the intellectual story that this work has described. As in previous centuries, the dynamic of difference between Westerners and non-Europeans was predicated on the capacity to master and exploit nature. This, in turn, created a standard of environmental exploitation. One could place societies in a hierarchical scale of progress by judging how much they exploited their ecosystems for economic gain. The developmental mission was, then, as the civilizing mission had been before, a twofold project of bringing humans and nature out of wilderness.28 As underdeveloped peoples and underdeveloped nature were again (but using a different vernacular) placed in a continuum, modernization entailed bringing non-European peoples ‘out of nature’ so that they could autonomously ascend over it and exploit it.

It is striking the extent to which modernization bore a resemblance to previous progressive philosophies of history, particularly conjectural history. Both traditions identified the existence of different stages through which all human societies transited in their path toward progress. Both were simultaneously descriptive and prescriptive, and interpreted reality as well as created it. Both visions were born in powerful locations and were embraced by powerful agents that had the tools to implement their vision of the world and superimpose it onto the ‘real’ world. Modernization also rescued from the annals of history the identification of a society’s productive capacity as benchmark for its progressiveness.29 It was stadial theory that had popularized the ideas that humans progressed as they managed to more thoroughly exploit nature—in contemporary vernacular we could say that modernization was merely ‘copy-pasted’. The intellectual influence of Henry Maine and nineteenth century social theory is also evident. In fact, modernization theory can be seen as the epitome of the old social distinction between traditional and modern societies.

27 Ibid.
28 Rostow made an explicit reference to wild land and natural resources in his reflections on how settler societies took-off. Ibid., 17.
29 In 1949, at the inauguration of the ‘development era’, Truman had already characterized underdeveloped societies as unproductive. Accordingly, development should help those societies ‘to produce more food, more clothing, more materials for housing, and more mechanical power …’. Pahuja, Decolonising International Law, Appendix two 267. See also Rostow, The Stages of Economic Growth, 13.
Modernization theory reconfigured the world in ways that are by now familiar and that have had enormous and deleterious effect for non-Europeans. It is clear that modernization contributed to what I have called the conceptual appropriation of non-European nature, that is, the definition of nature and people in non-European territories in a way that favored European hegemony. The existence of underdeveloped areas and peoples outside the West called for a redeployment of the Western superior capacity to master and exploit nature. Progress, understood as the domination of nature, was the way to overcome what for Truman were the three ‘ancient enemies’ of humanity: ‘hunger, misery and despair’.

Once the ‘old’ vision about the most progressive way to relate to non-European nature was inserted at the core of the ‘new’ vocabulary of development, it still had to be decided how to carry out that grand vision. What were the most suitable institutional mechanisms for arriving at the progressive and developed society that Truman and Rostow had envisioned?

The answer could already be found in Truman’s speech. The developed society he proposed as a model for the world was a capitalist society, namely one based on the twin economic institutions of private property and enterprise and free trade. As part of his development program, he committed the U.S. to ‘foster capital investment in areas needing development’. This in turn required the participation of the U.S. business community, ‘private capital’, industrial agriculture, and intensive labor. Finally, development was an instrument to favor U.S. free trade with the rest of the world.

Rostow shared Truman’s conviction that development should be based on private capital and free trade. For him, the transit of a self-sufficient community to a modernized society required expanding trade from a local setting to a national ambit and even a broader international scale. In addition, he believed that the expansion of trade had been one of the cornerstones of European progressive development. That allowed the glorification of the masculine colonial past, particularly ‘those men devoted to commerce: men concerned with fine calculations of profit and loss, men of wide horizons, whose attitudes communicated themselves in various ways through their societies’.

The rise of a traditional society to modernity demanded the dismantling of the very economic and social fabric of that society and its reconstitution in a capitalist model. That implied, first of all, ‘persuading the

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30 Ibid., 268.
31 Ibid., 267.
32 Ibid.
33 Ibid.
34 Ibid., 19.
peasant’ to embrace industrial agriculture and orient his production to ‘wider markets’.\textsuperscript{36} In addition, industrialization required a body of experts, technicians, and an entrepreneurial class oriented toward ‘expanded output’.\textsuperscript{37}

Development, as modernization theory conceived it, encouraged both what I have called the conceptual and the material appropriation of non-European nature. This means it defined non-European nature and people as backward and in need of Western intervention while, at the same time, promoting private economic rights as the most efficient and progressive way to undertake that intervention.

For Rostow, modernization was both the history of the privatization and commodification of nature as well as the application of modern science and technology. Both processes went hand in hand and reinforced one another. The path for the new independent nations was clear. But what was the role of international law in the new ‘era of development’? In what ways did international law help the U.S. and other Western nations implement the wide-ranging and thorough agenda of change that Truman had generously offered to the world on the 20 January 1949?

\textit{Development and international law}

International law relates to the ‘era of development’ in two crucial ways—one is conceptual, the other practical. On the one hand, in the post-war period in which development was born (or rather reborn) international law helped build an indissoluble and necessary link between decolonization, the nation state, and development.\textsuperscript{38} On the other hand, international law was the instrument that permitted the articulation of the institutional apparatus that facilitated the implementation of development in the decolonized world.

By the mid-twentieth century, international law offered decolonizing nations a language to counter imperialism. But, in so doing, it also kept the radicalism of non-European nations within a limited conceptual horizon that prevented a real change of the structural power inequality which had characterized the relationship between different areas and continents during the colonial era. Two basic legal principles of the post-colonial era, namely self-determination and sovereign equality, promised newly independent nations an end to the political subjugation experienced under European rule. At the same time, the only way in which human communities could gain international recognition, and hence

\textsuperscript{36} Ibid., 140. Industrial agriculture was oriented toward the market and based on ‘farm machinery, chemical fertilizers, diesel pumps, etc.’, Ibid., 8 and 23.

\textsuperscript{37} Ibid., 140.

\textsuperscript{38} This is the argument that Pahuja convincingly makes in \textit{Decolonizing International Law}. 

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sovereign status, in the post-colonial era was by constituting nation-states. Only nations were recognized actors of international law. But statehood and nationhood had a very specific meaning in international law, one that had been historically associated with the supposedly universal and progressive trajectory of Western nations. The state incarnated the modern organizational nature of progressive societies. Consequently, the goals and orientation of the international community that non-European nations entered after decolonization were already established. The form (nation) that the newly independent non-European communities historically ‘inherited’ had inscribed within it a particular understanding of human life (progress). The nation-state had a purpose, an ultimate raison d’être, that had been historically implanted into it. In the post-colonial era, that rationale was termed ‘development’.

This does not mean that the aspiration of national development was forcibly imposed upon non-European nations. In fact, that aspiration was also fully embraced by the nationalist leaders. As Chatterjee has claimed, independent nations challenged the charge of cultural inferiority associated with colonialism precisely by claiming that the new nations were able to modernize themselves. Non-European nations limited their backwardness to the economic sphere, but by doing so were not able to completely break free from the Western conceptual universe. Through the developmental state, international law allowed non-European nations to gain formal sovereign equality while maintaining old imperialist hierarchies.

The end of history that Fukuyama would announce in the 1990s seemed real, at least to a certain extent already in the 1960s. While there were several ideological alternatives for achieving the advanced vision of society that development encapsulated, the horizon of progress was one and the same for all nations. Eventually in the 1990s Fukuyama celebrated the consolidation of the single path for reaching that horizon: liberal democracy. But in the 1960s the developmental state had already become the accepted paradigm, the only international political unit. The difference with colonial times was that whether civilization was a requisite for statehood in the nineteenth century, development was no requisite in the post-colonial era. Every colony could achieve independence regardless of its developmental condition. The new international order was politically even in form. Contrastingly, in substance, there was an economic hierarchy between its members. This new gap allowed Western nations to launch a new grand program of reform for the underdeveloped world.

39 Ibid., 55.
41 Pahuja, Decolonizing International Law, 54-59.
42 Ibid., 49.
Perhaps the issue that most clearly evidenced the homogeneity of the developmental state was the approach to nature. All states, independent of the socio-economic ideology that they adopted (communism, socialism, capitalism), sought to modernize and attain economic growth in one way or another through the exploitation of nature. In the Soviet Union, for example, the intensive exploitation of the nation’s natural wealth was the cornerstone of industrialization. Communist industrialization in the Soviet Union produced widespread ecological destruction. Chernobyl was the ultimate proof of the huge impact the imperative of economic growth through industrialization had on nature in Soviet times. In Egypt, under the nationalist leader Nasser (one of the promoters of the Non-Aligned Movement), the construction of the Aswan High Dam to fuel Egypt’s industrialization caused an environmental disaster. Everywhere around the world, in India, Brazil, Nigeria, the U.S., Germany, and China, development and modernization projects took a huge toll on the environment.

Even at the theoretical level there was no clear alternative to the assault on nature that post-World War II economic growth demanded. Dependency theory, which in opposition to modernization explained underdevelopment as a result of the historically uneven economic relationship between Western and non-European polities, advocated self-sufficient economic growth through import-substitution industrialization. So, industrialization was again the basis of the radical goal of correcting international social inequality. Similarly, in a famous farewell letter to his children, the Argentinian revolutionary Che Guevara (perhaps the figure that most strongly incarnated the struggle against U.S. imperialism in the 1950s and 1960s) recommended his children to study hard ‘para poder dominar la técnica que permite dominar la naturaleza’ (‘in order to master the technique that permits the domination of nature’).

The same approach to nature was present in concrete attempts to reform international life. One of the key demands of the project of a New International Economic Order (NIEO), for example, was the permanent sovereignty over the nation-state’s natural resources. Through the NIEO several Latin American, African, and Asian nations attempted to redress the imbalance that characterized international

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46 Ibid., 162.
48 Reginaldo Ustariz, Che Guevara: Vida, Muerte y Resurrección de un Mito (Madrid, Nowtilus, 2008) 207 (translation by the author). This attitude contrasted with Che’s advice to his children ‘to remain capable of feeling deeply whatever injustice is committed against anyone in any part of the world’. See Richard L. Harris, Che Guevara: A Bibliography (Santa Barbara, Greenwood, 2011) 197-198.
economic relations in the post-colonial era. But in this context, and independently of who exercised it, sovereignty over natural resources meant effective control and exploitation of nature.\textsuperscript{49} The Resolution on the Permanent Sovereignty over Natural Resources indicated very clearly that sovereign control over each nation’s environment was subordinated to the goal of national development.\textsuperscript{50} Regardless of their political radicalism and their merit in bringing about a just and socially equal world, all ideological avenues for the development of the nation state in the post-war era followed a one-dimensional economic path, which had as its cornerstone the exploitation of nature.

The fact that there was a general agreement on how states worldwide ought to use the part of the Earth within their national borders facilitated the second way in which international law related to nature in the ‘era of development’. International law provided the legally authoritative texts and the institutional apparatus to inscribe development deeply into the texture of international life after the Second World War. Some of the most important international legal instruments of the post-war era, such as the UN Charter and the two International Covenants of Human Rights, embraced development as one of the priorities of the new international order, linking it with international cooperation and a concrete set of expert international institutions that were to implement it.

Article 55 of the United Nations Charter, for instance, established as one of the main goals of the United Nations in the socio-economic sphere the promotion of ‘social progress and development’.\textsuperscript{51} In particular, the Charter compelled colonial powers to promote development in non-European states under their administration.\textsuperscript{52} It internationalized this mandate, inviting colonial powers to cooperate in the goal of development with specialized international bodies.\textsuperscript{53} Similarly, Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights linked self-determination, and hence, the right to independence of non-European colonies with the pursuit of economic development.\textsuperscript{54}

\textsuperscript{49} See Declaration on the Establishment of a New Economic Order, GA Res. 3201 (S-VI), 1 May 1974 [http://www.un-documents.net/s6r3201.htm, accessed 17 March 2016]. See also
\textsuperscript{50} Declaration on the Permanent Sovereignty over Natural Resources, GA Res. 1803 (XVII), 14 December 1962 [http://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf, accessed 17 March 20016].
\textsuperscript{52} Ibid., Article 73 (d).
\textsuperscript{53} Ibid.
The International Covenant of Economic, Social, and Cultural Rights linked the right to work with the achievement of social and economic development. The ultimate reason for human labor was the achievement of economic growth and socio-economic development. The Covenant also presented development as a crucial way of fulfilling the right to an adequate standard of living and of combating hunger. In particular it set the premises for agricultural modernization worldwide. Signatory States committed themselves to employ ‘technical and scientific knowledge’ to improve ‘agrarian systems’ in order ‘to achieve the most efficient development and utilization of natural resources’. Moreover, one of the ways in which agricultural modernization was expected to take place was through ‘international cooperation’. Article 11 of the Covenant resembled in important ways the program of modernization advocated by Rostow. Agricultural modernization became linked with the human right to a good standard of living and the improvement of living conditions. Development through international cooperation was elevated to the status of a legal obligation. It was set as a progressive goal to modify non-Europeans’ systems of agriculture, and this was to have enormous implications in the years to come.

Apart from inscribing development and international legal institutions in the international life of the post-colonial era, international law was the language that facilitated the creation of the concrete international apparatus that were going to implement development in, to use Truman’s expression, ‘underdeveloped areas’. In his inaugural address Truman invited technologically advanced nations to cooperate ‘through the United Nations and its specialized agencies’ in order to foster development and ‘raise substantially’ the ‘standards of living’ of non-European populations. In addition to this invitation, the Truman Administration provided vital economic and political support to the developmental agendas of several international organizations. The most important among them were the World Bank (WB), the World Health Organization (WHO), and the Food and Agriculture Organization (FAO). The Truman Administration poured millions of dollars into these agencies, strengthening the United Nations agencies that were going to implement point four of his program. Development was part of the theoretical body of international law, and international organizations became the tentacles that allowed development to spread throughout the world, reshaping non-European nature as a result.

55 Ibid., Article 6.2.
56 Ibid., Article 11.2 (a).
57 Ibid.
58 Ibid.
59 Pahuja, *Decolonising International Law*, Appendix two 266.
60 Ibid., 267.
62 Ibid.
The Green Revolution: domination of nature in practice

It would be logical to think that after decolonization the West would have lost its hegemonic hold over non-European nature. As new independent nations gained sovereignty, and hence control over their territory, they could use the ecosystems comprehended in that territory at will. But decolonization unfolded in parallel to the universalistic era of development. Development, in the modernizing version sponsored by the U.S., opened a window of possibility for the West to retain its influence and control over non-European natural habitats. International standards and institutions rapidly acquired a defining power over non-European nature thanks to a growing influence in deciding the goals to which the vacant natural resources of the global South ought to serve. The existence of underdeveloped regions and the call for their improvement constituted a new opportunity for the West to retain its conceptual hegemony over non-European nature.

As aforementioned, that hegemony consisted in the historical capacity of the West to depict non-European nature and, based on that image, to determine how it ought to be employed. In the ‘era of development’ that power, in turn, allowed Western nations to deploy their supposedly superior technological and scientific knowledge to manipulate the environment. International organizations were at the forefront of that grand scheme. A detailed study of how concretely international organizations helped reinstitute Western dominance over non-European ecosystems is beyond the scope of this study. However, before turning the focus of attention to the topic of international conservation, I would like to briefly illustrate my point by way of one example.

The Green Revolution was one among a series of large interventions by international organizations oriented to reshaping non-European nature. In his 1949 speech, Truman clearly linked poverty with food shortages. In addition, he identified the latter as one of the main problems of underdeveloped areas. Accordingly, he declared that it was incumbent upon the U.S. and other wealthy Western states to help underdeveloped peoples increase food production.

Altruism was not the only reason behind the Green Revolution. U.S. policy makers were convinced that food availability was vital for national security. Hunger could engender revolution and, concretely, foster the specter of communism in non-European states—a scenario that had to be avoided at all costs. Finally, the Green Revolution was part of the universal program of modernization sponsored by Rostow.

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63 Pahuja, *Decolonising International Law*, Appendix two 266.
64 Ibid., 267.
and modernization theory. Transforming local subsistence agriculture into industrial agriculture oriented to international markets was a vital part of the consolidation of capitalism’s economic institutions and relations worldwide.\textsuperscript{66} In turn, that shift profited U.S. agribusiness and transnational corporations, which invested in agricultural technology in the global South.\textsuperscript{67}

Inspired by Truman’s policy recommendations and the dictates of modernization theory, the Rockefeller Foundation established an agricultural research center in Mexico in 1943. The main goal of the center was to obtain grain varieties (mainly wheat) that produced better yields.\textsuperscript{68} The center soon grew into a large organization of international scope: the International Center for the Improvement of Corn and Wheat.\textsuperscript{69} A decade later the Rockefeller foundation started a similar initiative in the Philippines, which was soon joined by the Ford Foundation.\textsuperscript{70} The Philippine International Rice Research Institute as its Mexican counterpart received millions of dollars from both Foundations and the U.S. Agency for International Development.

U.S. experts believed that the high-yielding seeds that both institutes developed could be used worldwide. But the production of high-yielding seeds and their international dissemination was only one step of a larger modernization process known as the Green Revolution. New seed varieties needed fertilizers, herbicides, pesticides, and hydraulic infrastructure. The Green Revolution also sponsored the mechanization and commercialization of agriculture, orienting cultivation toward the production of cash crops.\textsuperscript{71}

The World Bank took a leading role in providing the loans that non-European states needed in order to implement the necessary changes in their agricultural sectors and build the infrastructure that was required to irrigate huge acres of land.\textsuperscript{72} In addition, it created an international research network known as the Consultative Group on International Agricultural Research, which sponsored a multitude of research centers (following the Mexican and Philippine model) around the world.\textsuperscript{73} In the two and a half decades that the Consultative Group functioned, the World Bank provided training for approximately 50,000

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\item[\textsuperscript{66}] Escobar, \textit{Encountering Development}, 127-128.
\item[\textsuperscript{67}] Ibid., 128.
\item[\textsuperscript{69}] Ibid., 178.
\item[\textsuperscript{71}] Ibid., 109-120.
\item[\textsuperscript{73}] Ibid., 85.
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scientists. This was a staggering number of agricultural experts, who eventually had an enormous influence on agricultural policies worldwide. As soon after they were trained, many of them joined Ministries of Agriculture and Finance in non-European states and occupied managerial position in large corporations. Therefore, they were able to influence agricultural policies and practices worldwide and disseminate the vision of agriculture in which they had been trained.

The World Bank was also joined by the Food and Agricultural Organization (FAO) in paving the way for the Green Revolution. With a budget that paled in comparison to that of the WB, the FAO had a more limited role in the promotion of the Green Revolution. It provided political support for the Green Revolution at the international level by presenting it as the best way to achieve modern and efficient agriculture in underdeveloped non-European states. This institutional support for the new policies from the international body in charge of promoting agriculture worldwide was far from inconsequential. Through its technical advice and support for underdeveloped areas the FAO contributed to the consolidation of just one model of agriculture for the whole world: that promoted by the Green Revolution.

The Green Revolution is a good example of how the social, political, and economic complexity of the post-war world was turned into a managerial problem. It bypassed crucial questions that had considerable political implications such as unequal land distribution, wealth inequality, access to markets, terms of trade, and other structural conditions that contributed to the creation of the very conditions of ‘poverty’ that the Green Revolution aimed to addressed. Instead, it presented poverty and food scarcity as a managerial question, one that could be resolved by the application of modern Western science and technology.

The Green revolution swept the territories of the new independent nations. While in 1970s the new crop varieties produced by the Green Revolution occupied only 15 percent of the land in the decolonized world, that amount increased to approximately 75 percent by the 1990s. While it is undisputable that new seed varieties allowed substantially increased agricultural yields, that quantitative success had enormous social and environmental costs.

74 Ibid., 86.
75 Ibid.
77 Ibid.
78 Latham, The Right Kind of Revolution, 110.
79 Ibid.
80 Ibid., 116.
81 Ibid.
The Green Revolution affected patterns of land distribution worldwide, increasing land concentration and producing landlessness at the same time. This was so because agricultural modernization was applied in countries with great social disparities without attention to context. Sensibility and attention to social, political, economic, and cultural differences is precisely what the single recipe of development neglected all along. It failed to recognize that the infinite intricacy of social life thwarts any attempt at social engineering.

In the particular case of the Green Revolution, the need for capital to buy fertilizers, pesticides, machines, and fuel, and the need for large tracts of land to implement industrial agriculture strengthened the position of landowners while making it more difficult for small cultivators to reap the benefits of mechanization and production for exports.82 Some of the documented social consequences of the Green Revolution have been the indebtedness of small cultivators, the polarization of rich and poor farmers, the marginalization of the latter, and the increasing dependency of peasants vis-à-vis the market.83 Unable to compete in the market millions of peasants lost their lands, providing necessary cheap labor for export-producing industrial agricultural business.84 Paradoxically, the Green Revolution contributed to increasing the destitution that it purposely sought to counteract. It also exacerbated global and national inequalities.85

Social inequality was not the only impact of the Green Revolution. The widespread use of seeds that demanded fertilizers depleted vast amounts of land, causing the reduction of soil fertility and even soil erosion. The extension of monocrops reduced biodiversity. Cultivated in extensive fields, the new seed varieties also demanded the intensive use of water resources. Huge dams that had enormous ecological impact were created to irrigate fields planted with these new seeds. The use of herbicides and pesticides polluted food and aquifers and in many cases also caused health problems for the peasants that manipulated them. In addition, the use of fuel-demanding technologies dramatically increased the

84 This process did not occur without resistance. In Brazil, for instance, the landless peasant movement advocated land redistribution and the orientation of production to cover the social needs of people instead of profitable market interests.
emission of greenhouse gases in comparison to non-industrial agriculture. Overall, new industrial agriculture proved largely unsustainable.  

The Green Revolution was part of the larger program of development that sought to modernize and reform the ‘primitive and stagnant’ (in the words of Truman) life of underdeveloped non-European populations. This large scheme strengthened Western hegemony over non-European nature in two familiar ways that this study has underlined repeatedly. On the one hand, the Green Revolution contributed to the conceptual appropriation of nature, defining non-Europeans agriculture and non-European peasants as backward. Development and progress demanded a rather thorough and intensive utilization of non-European land and ecosystems that, in theory, non-European agriculture could not achieve by itself. What was needed, then, was the deployment of Western science and technology. On the other hand, the intensive model of land exploitation that the Rockefeller Foundation, the Ford Foundation, USAID, the FAO, and the World Bank promoted was associated with a specific institutional economic mechanism to relate to land and resources. Agricultural modernization as conceived and promoted by the U.S. and international organizations worldwide was inextricably linked to private property rights, trade, and investment.

The Green Revolution not only entailed social, political, and economic changes. It also affected the relationship between non-European peasants and nature in a deeper way. In this sense, Latham has argued that in the Philippine International Rice Research Institute ‘scientists, promoters and sponsors … expected that the new seed would trigger changed in the psychology and worldviews of the farmers that adopted it’. Peasants who for centuries had obtained from nature the inputs they needed to cultivate had, under the imperative of modernization, to be transformed into businessmen, orienting their activity exclusively to the maximization of profits.

International law played a large role in the appropriation of non-European nature by Western and non-European elites after decolonization. International texts and organization endorsed the developmental agenda that Truman presented and the modernization theory that accompanied it. Supported by the new

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87 Pahuja, Decolonising International Law, Appendix two 266.
88 Goldman, Imperial Nature, 87.
89 Latham, The Right Kind of Revolution, 114.
ideology of progress and the huge apparatus that sustained it, international organizations, Western nations, and multinational corporations led a series of massive interventions to manage non-European nature that greatly affected non-European populations. The World Bank more than any other international organization took a prominent role in this process. For Bryant and Bailey:

In a manner reminiscent of colonial times … IFI-sponsored ‘progress’ was measured in terms of trees felled, valleys flooded, minerals extracted and acreage dedicated to cash crops or cattle ranching. The flip-side of such ‘progress’ … was ruined livelihoods and degraded environments as the environmental resources of poor grassroots actors were despoiled by loggers, engineers, mining companies, cattle ranchers, agri-business or land-hungry migrants encouraged by state and World Bank officials.

In the new international scenario that appeared after decolonization, the link between development and international law reinstated Western domination over non-European nature at a high environmental and social cost. Because of the imperative of development, agriculture—a practice through which almost half of humanity related to nature—needed to be completely reformulated. Modernization through Western science and technology was the way forward, a way that also entailed the development of a business mentality. However, at the same time, there was another large international project of intervention over non-European nature that seemed to base the human-nature relationship on a non-exploitative basis. Conservation encapsulated the promise of protecting nature in the era of economic growth.

Counterpoint: Conservation

The colonial roots of conservation

So far the present study has revealed the existence of a repetitive pattern in Western intellectual history, one that underlines the way in which international law has been implicated in the appropriation and exploitation of non-European nature during the colonial era. In so doing, this work has emphasized

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90 In the sixties, seventies, and eighties the World Bank funded large projects in non-European countries that had enormous environmental costs. One of those projects was the gigantic Carajás project in Brazil Amazonia, which occupied an area of 900,000 square kilometres (an area of the size of Venezuela). Among the ecological costs of the project was the destruction of 1,500 square kilometres of rainforest every year. See Bryant and Bailey, Third World Political Ecology, 90-91. See also Bruce Rich, Mortgaging the Earth: The World Bank, Environmental Impoverishment and the Crisis of Development (Boston, Bacon Press, 1994) 29-33.

91 Bryant and Bailey, Third World Political Ecology, 89.
continuity and has not contemplated the possibility of contrasting tendencies within colonial history and international legal historiography. However, it would be possible to construct an alternative history to the one this work narrates by paying attention to the way in which European intellectuals and colonial figures sought to protect nature. For this reason, in the last pages of this research, I would like to turn the focus of analysis to that alternative story in order to determine whether it sits comfortably with or rather challenges the main narrative of this work.

It is fair to say that some of the main protagonists of this study had ambivalent attitudes toward nature. In these cases, they fell short of giving humans carte blanche to use nature at will. This, for example, is evident in Las Casas’ affirmation that humans could not treat non-human nature as they pleased. Their power over nature was constricted by the need to respect God’s plan for the fulfillment of nature’s perfection. For Las Casas, human superiority over the environment was limited by God’s program—the content of which was, nevertheless, not outlined. During the sixteenth and seventeenth century, preoccupation about the overall human impact over nature was logically absent, as humanity’s capacity to negatively affect the Earth was still somewhat limited.

Environmental concerns became more prominent during the Industrial Revolution as the human power to manipulate and exploit nature significantly increased. As aforementioned, John Stuart Mill was one reputed figure who warned his contemporaries about the ecologically destructive processes set by industrialization. In contrast, he generally perceived non-European ecosystems, particularly in settler colonies, as a wilderness to be civilized. Mill’s attitudes toward colonial nature contrast with the attention that colonial administrators paid to environmental dynamics in small tropical islands.

Western imperialism fomented exploitative attitudes toward nature. Paradoxically, one important stream of conservation was born out of the growing awareness about the adverse environmental effects of the colonial economy. Despite early observations of environmental degradation in the Canary Islands and Madeira in the sixteenth century, it was not until the eighteenth century that critiques of environmental degradation found space in colonial debates. One of the main reasons for this shift was the evidence of rapid environmental deterioration in tropical islands. These types of islands were more than mere physical places of provision and plantation agriculture for the metropolis. They acted as well as powerful ideal images in the Western intellectual tradition. They were the place of location for paradisal

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92 See supra Chapter 2, page 105.
93 See supra discussion at pages 283-284.
utopias, Gardens of Eden and Arcadias.\textsuperscript{95} And while exotic islands in the tropics offered the possibility of redemption and relief from European social upheavals, they also posed a threat to physical and mental health.\textsuperscript{96}

Due to the small size of islands, it was relatively easy to observe and measure the swift environmental changes that followed their incorporation into transcontinental trading networks dominated by Europeans.\textsuperscript{97} Accordingly, the first local attempts at conservation were made by the East Indian Company and the French in the islands of St. Helena and Mauritius.\textsuperscript{98} The new sensitivity toward the environment grew out of a contradiction. The appreciation of tropical islands in Western thought and the value of their preservation clashed with the destructive ecological forces unleashed by the expansion of European plantation agriculture and overseas trade.\textsuperscript{99}

Despite early attempts at conservation, it was not until the mid-eighteenth century that climate theories and deforestation combined to provide a more convincing justification for conservation. Before that time, deforestation was perceived as negative only when it created timber shortages. The first attempt at the thorough analysis of conservation practices to control the impact of a ‘capital-intensive, slave-utilizing plantation economy’ took place in the French island of Mauritius.\textsuperscript{100} Conservation policies were also partly the result of the efforts of single individuals such as the botanist and naturalist Pierre Poivre who linked deforestation with the alteration of rain patterns.\textsuperscript{101} Theories of climate change and desiccation linked to environmental degradation posed a threat to the long-term survival of colonies that could not be ignored.

The program of conservation implemented in Mauritius was soon replicated by the EIC in some British islands such as St. Helena.\textsuperscript{102} But their major continental application during the nineteenth century was

\textsuperscript{95} Williams, \textit{Deforesting the Earth}, 196.
\textsuperscript{96} Grove, \textit{Green Imperialism}, 33.
\textsuperscript{97} Williams, \textit{Deforesting the Earth}, 326.
\textsuperscript{98} Ibid., 326-328.
\textsuperscript{99} Grove, \textit{Green Imperialism}, 72.
\textsuperscript{100} Ibid., 475.
\textsuperscript{101} Ibid., 166.
\textsuperscript{102} Ibid., 10.
in India.\textsuperscript{103} In fact, it was India’s forest conservation practices that were, in turn, replicated in other colonies of South East Asia, Australasia, and Africa.\textsuperscript{104}

One of the main consequences of the direct involvement of colonial powers in conservation was the creation of forestry departments, which seized considerable portion of the territory of the colonies to assure their preservation. Environmentalism justified colonial control of vast areas of the globe. In India, for instance, more than one-fifth of the total extension of the colony was in the hands of the Forest Department by the end of the nineteenth century.\textsuperscript{105} By the beginning of the next century, the British Empire had protected an area ten times the size of Great Britain.\textsuperscript{106}

Participation of colonial powers in conservation was driven, largely, by their need to assure the availability of natural resources for the empire. Nevertheless, protection of resources \textit{per se} is not enough to explain the implementation of conservation policies in the colonies. Theories of climate change posed a more serious and long-term challenge to colonial rule. This was so, not only because desiccation threatened natural resources, making their exploitation difficult, but also because it could provoke famine and, thus, social unrest.

Efforts of colonial conservation and state intervention helped reduce the excesses of laissez-fair policies and the unlimited appetite of private capital for the exploitation of natural resources.\textsuperscript{107} Environmental preservation evidenced the divergent approaches to nature held by private capital and the imperial state. Short-term private profit often conflicted with the state’s long-term plans.\textsuperscript{108} However, despite the capacity of early colonial conservation to soften the most adverse impact of unrestricted Western economic forces on nature, there was also a dark side to its legacy.

Controlling nature meant also controlling the non-European populations that inhabited those protected areas. The social component of environmental protection turned out to be, in the hands of imperial powers, a new instrument for governmental authority and domination of non-European populations. Discourses


\textsuperscript{104} Burton, ‘Empire Forestry’, 529.

\textsuperscript{105} Berthol Ribbentrop, \textit{Forestry in British India} 72. Burton claimed that eventually the power of the state extended to almost all of the Indian forest. See Burton, ‘Empire Forestry’, 529.

\textsuperscript{106} Burton, ‘Empire Forestry’, 529.

\textsuperscript{107} Ibid.

\textsuperscript{108} However, this did not mean that conservation policies always succeeded in controlling private capital. For a discussion about the interplay of these conflictual forces in India see Ribbentrop, \textit{Forestry in British India}, 69-75.
of environmental threats justified the colonial acquisition of large portions of land in Asia and Africa and the exercise of increasing control over non-European populations.\(^{109}\) Because of these policies, non-Europeans’ enjoyment of their surrounding environment was severely curtailed.\(^{110}\) Entire cultures were alienated from natural habitats by the colonial administration.\(^{111}\) Referring to India, Williams affirms that:

The foresters and their regulations became the face of alien power, which pervaded Indian rural life just as surely as any military, judiciary, or political administration framework. The process of colonization was far more complex than political domination alone. Its cultural, economic, and even psychological ramifications cut deeply into the fabric of traditional life—in this case the forest—carrying with them rapid and sometimes deleterious change.\(^{112}\)

Western environmental science validated colonial authority. In India, surgeons of the colonial administration were convinced that the itinerary cultivation practices of the Kumri people threatened forests.\(^{113}\) In view of that, dispossession of their land was justified by health concerns related to environmental degradation.\(^{114}\) Once controlled and deprived of their means of living, they became a cheap source of labor for the colonial economy.\(^{115}\)

In Africa, the consequences of this new kind of domination were also significant. As in the rest of the colonial world, African botanists relied on theories and assumptions about natural degradation and ecological change that were in vogue and circulated in European and Indian intellectual circles at the time.\(^{116}\) This kind of analysis, exported to Africa, became institutionalized in forestry protection policies without further research.\(^{117}\) Colonial scientists wrongly assumed that large portions of the African landscape, especially savanna ecosystems, had been covered by forest before. They also established a

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110 Ibid.
111 This explains why many of the attempts of environmental colonial protection encountered fierce resistance. See Grove, ‘Colonial Conservation’.
112 Williams, *Deforesting the Earth*, 346.
113 Ibid., 333-334 and 343-344.
114 Ibid., 343-344.
115 Ibid.
117 Ibid., 180.
link between deforestation, the extension of drought, and the advance of deserts, an idea that can still be found in current analyses.  

In Africa, the colonial state also assumed the goal of conservation. Lugard explicitly mentioned conservation as one of the ultimate tasks of the colonial state. Because of the environmental destructiveness of Africans’ agricultural systems, Lugard believed that ‘the forest wealth’ of African territories was under threat. Consequently, it was the task of the colonial administration ‘as trustee for posterity against the reckless destruction of the present generation’ to safeguard what remained of African tropical forests. In order to carry out this task, Lugard recommended the extension of the power of the colonial state over tropical forests and the creation of forest reserves.

It is worth noticing that the colonial scientific reading of African landscapes was largely misleading and opposed to what local knowledge and recent research suggest. Importantly, this sort of distortion had a dramatic effect on local populations, as environmental protection justified state intervention, removal, and repression. African rural inhabitants were identified as the cause of environmental degradation. Therefore, they had to be either enlightened or disciplined—by force, if necessary.

The control over natural resources was removed from the hands of local inhabitants who were regarded as unreliable custodians of the land. These measures dislocated local communities which nevertheless actively resisted these forces, contributing to partly shaping the results of this power struggle. Paradoxically, in some cases conservationism accelerated degradation, exacerbating the very problems that it was supposed to resolve. In his analysis of forestry conservation in Tanzania, Monson suggests

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119 Lugard, The Dual Mandate, Ch XIV 299.
120 Ibid., Ch XV 315.
121 Ibid., 315 and Ch XXVI 527.
122 For an example of Savanna’s landscape, see James Fairhead and Melissa Leach, Misreading the African Landscape: Society and Ecology in a Forest-Savanna Mosaic (Cambridge University Press, 1996). See also Bassett and Crummey, ‘Contested Images’.
123 Ibid., 3-4. The effects of similar analysis and policies in Mali are described in Tor A. Benjaminsen, ‘Conservation in the Sahel: Policies and People in Mali’ in Broch-Due and Schroeder, Producing Nature 94-108.
126 See Grove, ‘Colonial Conservation’.
127 Monson, ‘Canoe-Building’, 210. A similar opinion about Indian forests can be found in Williams, Deforesting the Earth, 334.
that the answer to this paradox lays in the fact that ‘government impositions … were part of an economic strategy that did not seek to end the exploitation of the forests but simply to change its form’.\footnote{Ibid.}

Ultimately, the increase of power and resources in favor of the colonial state—either in the form of natural resources or natural reservoirs—entailed disempowerment and impoverishment for large sectors of the rural African population.\footnote{It is not surprising then that Fairhead and Leach have concluded: ‘The economic structures within which forest services operated can thus be seen to have helped frame the production of knowledge about forestry problems and to produce localities accordingly.’ See Fairhead and Leach, ‘Reproducing Locality’, 181.}

Colonial conservation seems to somehow contradict the thesis that Western imperialism contributed to the appropriation and exploitation of nature. This is true to a certain extent as conservation in the colonies tended to assure the long term availability of natural resources. But it is also important to bear in mind that colonial conservation was born out of the preoccupation with the rational exploitation of colonial natural resources, rather than with the overall preservation of nature. Moreover, although colonial conservation managed to somewhat limit the most adverse effects of the profitable colonial economy, it also contributed to the appropriation of nature. While under the rationale of civilizing wild colonial nature non-European ecosystems could be appropriated for exploitation, the rationale of conservation allowed the seizure of the very same wild non-European ecosystems for the contrary purpose of their preservation.

Both rationales also provided justification for an increase in control over non-European populations. Colonial conservation justified authority over non-European peoples for exactly the contrary reason to their assumed lack of mastery over nature, which (this study claims) was one of the bases of the civilizing mission. In this light, non-Europeans, who had largely been perceived during colonial times as unable to modify nature enough, were also perceived as threats to the conservation of valuable ecosystems. In light of the preceding conclusions, an important question to be answered in the remaining pages is whether this situation has changed with the end of colonialism.

\emph{International law and conservation: toward the post-war era}

The animating rationale of conservation during the eighteenth and nineteenth century was the assurance of the long-term availability of natural resources for European empires. However, the genealogy of international conservation after the Second World War points toward a different origin. It owes its beginnings to the colonial fascination with African wildlife at the turn of the twentieth century and the
conviction about the urgency of its preservation. Various factors converged at that historical moment. The assurance of game for hunting for the colonial elite spurred the creation of game reserves within the British Empire at the end of the nineteenth century. But as the century drove to an end, the rapid diminution of game in South Africa increased colonial concerns about the impact of excessive European hunting on African wildlife.

There was a widespread belief that, unless measures of conservation were rapidly introduced, African fauna was doomed to extinction. At the beginning of the twentieth century, letters that travelled back and forth between colony and metropolis raised alarm about the possibility of species extinction. German ornithologist Oskar Neumann, for example, wrote to the colonial department in Berlin warning that without measures of conservation several African animals were soon going to be gone forever. The same concern prompted British Prime Minister Lord Robert Cecil to alert the colonial administrators of Uganda and the East African Protectorate about the destruction of African wild animals.

Another source of preoccupation for colonial authorities in Africa was the ivory trade. Ivory was of utmost importance for the colonial economy. So, when the indiscriminate killings of elephants threatened to halt commerce all together, colonial authorities were compelled to act. An African explorer and passionate hunter, Herman Von Wissmann was a ‘privileged’ witnesses of the elephants’ slaughter. When he was appointed governor of German East Africa, he was convinced of the necessity of protecting African wildlife. To this end, he passed a series of ordinances to protect game in the German territories. Similar regulations were introduced in several British African colonies at the end of the nineteenth century.

But Wissmann and other German colonial officers went one step further. They were convinced that without international cooperation, ordinances and game reserves were not going to be able to halt the

135 Ibid.
decimation of African wild fauna. Accordingly, the Germans proposed that the British hold an international conference on the preservation of wildlife in Africa. The British received the German proposal with enthusiasm and the Foreign Office took responsibility for organizing the event. As a result, the International Conference for the ‘Preservation of Wild Animals, Birds and Fish in Africa’ convened in London in 1900.

Representatives of all European colonial powers with interests in Africa—France, Germany, Italy, Portugal, Spain, and the Congo Free State—gathered at the Foreign Office in London between April and May 1900. In May, the colonial powers signed the Convention on the Preservation of Wild Animals, Birds and Fish in Africa, known as the London Convention. Among the policy prescriptions of the London Convention were hunting and trade restrictions, the creation of protected areas, and lists of species according to the necessary degrees of protection. Despite its innovative character and its undoubtedly historical importance, the Convention had two important shortcomings. First, it did not apply to the whole of Africa or even all of Sub-Saharan Africa. This deficiency was already recognized at the time of the Conference. Second, the Convention never entered into force.

The deficiencies of the London Convention and the growing importance of conservation in the British Empire had as a result a second international conference and the elaboration of a second international treaty on conservation in 1933. The 1933 International Conference for the Protection of the Fauna and Flora of Africa resulted in the Convention Relative to the Preservation of Fauna and Flora in the Natural State, also known like its predecessor as the London Convention. The British were again the main supporters of the conference and the treaty, reflecting the predominance of British conservation in the international world of the first half of the nineteenth century. The Convention entered into force in January 1936.

An important historical development that helps explain the transition and the link between the first and second London conventions was the foundation of the Yellowstone National Park in the U.S. in 1872. Yellowstone helped create the U.S. national park model of conservation that was to be replicated all over the world. For that reason, Yellowstone was a milestone in the history of international conservation.

139 Ibid., 22.
141 Ibid.
142 Rachelle, Elephant Treaties, 24-25.
143 Ibid., 24.
144 Gibbl, ‘German Colonialism’, 134.
145 Adams, Against Extinction, 23.
British colonial officers gladly and swiftly welcomed the U.S. conservation model and applied it in various British territories in North America and Oceania.\textsuperscript{146} This development ran parallel to and influenced a shift in the colonial approach to wildlife conservation. Instead of focusing on the impact of elite hunting and the ivory trade, metropolitan and colonial authorities increasingly put the blame on the unsuitable hunting practices of Africans as factors leading to the decrease of wildlife.\textsuperscript{147}

The 1933 London Convention was a watershed in international conservation as it introduced two important innovations. One of them was the geographical expansion of the area covered by the treaty to the whole of sub-Saharan Africa, thus correcting a deficiency present in the previous London Convention. The second, which was to influence conservation during the whole of the century, was the creation of protected areas. Importing the concept of national park from the U.S. into the African context meant, as well, introducing a stark and, in many cases, total separation between humans and animals in protected areas.\textsuperscript{148} This approach produced what Cioc denominates ‘apartheid parks’.\textsuperscript{149} These kind of parks entailed preserving chunks of ‘wilderness’, which, according to Adams, have made the history of conservation ‘one of exclusion and latent or actual conflict’.\textsuperscript{150}

International regulations were not the only pillar of international conservation at the beginning of the nineteenth century. This period saw as well the emergence of powerful international non-governmental organization that strongly lobbied governments and influenced policy initiatives. The most important organization in the first decades of the nineteenth century was the London-based Society for the Protection of the Wild Fauna of the Empire (SPFE), founded in 1903. Spearheaded by Edward North Buxton, the society was integrated by influential aristocratic and political figures, business ‘men’, scientists, naturalists, hunters, writers on Africa, and colonial administrators.\textsuperscript{151} The Society functioned like an expert and pressure group with close ties to high-ranking British authorities. Its first task, after its creation, was to promote the implementation of the 1900 London Convention. Despite its clear conservationist nature, the Society always remained ambivalent about hunting. Many of its members were reputed hunters that advocated the compatibility of conservation with hunting for sport.\textsuperscript{152} Besides, the

\textsuperscript{146} Ibid.
\textsuperscript{147} Cioc, \textit{The Game of Conservation}, 47-48.
\textsuperscript{148} Ibid.
\textsuperscript{149} Ibid., 14-57.
\textsuperscript{152} Ibid., 258.
society saw colonial administration as the most efficient vehicle to protect African nature. For that reason, it worked hand in hand with the colonial office.153

The SPFE influenced British conservation during the first half of the twentieth century. In 1930, for example, the SPFE sent naturalist, explorer, and physician Major R. W. G. Hingston on a fact-finding mission to Africa.154 In a report on the state of African wildlife, Hingston identified four major threats to African wild fauna. According to Hingston the driving factors for the disappearance of African game were cultivation, trade, hunting, and the tsetse fly.155 His formula to save African wildlife from these destructive forces was the translation of Africa to the American model. That meant the creation of national parks with a legal status to protect animals and spare them from human presence.156 Hingston’s recommendations were adopted by the SPEF and through the latter’s lobbying efforts found reflection in the 1933 London Convention. In fact, according to Rachelle, by moving behind scenes the SPEF was actually the ‘mastermind’ of the Convention.157 It thus took upon itself ‘the government’s traditional role in international law making’.158

Around the same period the SPEF came into life, similar initiatives of preservation spread all over Europe. They resulted in the creation of a number of national conservationist groups.159 There were also attempts at founding an international organization that would serve as umbrella for these more dispersed national organizations.160 These efforts, however, would not crystalize until the end of the Second World War with the foundation of the International Union for Protection of Nature (IUPN) at Fontainebleau in 1948.161 The creation of a non-governmental international organization owed much to the support of Julian Huxley, a British biologist with influence in British colonial conservation, who had been appointed as first Director General of UNESCO.162
At the legislative level, the London Conventions were followed by a series of international treaties on conservation, the most important of which was the 1940 Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere. In the years before the Convention, Harold Jefferson Coolidge, an admirer of the British SPFE, had worked hard to create a similar kind of organization in the U.S.\textsuperscript{163} His initiative and that of the Boone and Crockett Club, an elite U.S. hunter-conservationist organization with members of high stature like President Theodore Roosevelt, resulted in the establishment of the American Committee for International Wildlife Protection in 1930.\textsuperscript{164} The Committee was from the outset interested in international conservation and, particularly, in the preservation of African wildlife.\textsuperscript{165}

The American Committee had strong links with the SPEF, and shared the latter’s belief in the importance of international law for the internationalization of British and American visions of wildlife conservation. Having close links to high ranking U.S. politicians, it also possessed the SPEF’s strong lobbying capacity. Based on these premises and inspired by SPEF’s leadership in the adoption of the 1933 London Convention, the American Committee, and specially Coolidge, took a prominent role in the work leading to the 1940 Western Hemisphere Convention.\textsuperscript{166}

In Europe at the end of the 1930s, the British government envisioned extending the rationale of the London Convention to Asia.\textsuperscript{167} Similarly, the SPEF hoped to be able to ‘export’ international conservation to Australasia.\textsuperscript{168} These initiatives, however, came to a halt with the onset of World War II. But in the aftermath of the war there was a proliferation of international conferences on conservation, which put forward the idea of a world convention for the conservation of nature.\textsuperscript{169} Yet something had changed in the field of international conservation. While the influence of the SPEF partly waned as de-colonization approached, UN specialized agencies, particularly UNESCO, gained notoriety in conservation.\textsuperscript{170} A world convention for nature was an urgent concern because of the need to preserve Western-style conservation in the post-colonial era. Moving international conservation from a colonial to an international plane was the best way to assure that after decolonization international conservation would

\begin{thebibliography}{99}
\bibitem{163} Ibid., 39-43.
\bibitem{164} Ibid., 41.
\bibitem{165} Ibid.
\bibitem{166} Ibid., 44-50.
\bibitem{167} Cioc, \textit{The Game of Conservation}, 53.
\bibitem{168} Rachelle, \textit{Elephant Treaties}, 46.
\bibitem{170} Neumann, ‘The Postwar Conservation Boom in British Colonial Africa’ 37.
\end{thebibliography}
still be informed by the Western approach to non-European nature and its vision of non-European people.\textsuperscript{171}

\textit{Serengeti and the Massai: international post-colonial conservation}

The institutional architecture of international conservation was well established in the post-war period. The IUPN and UNESCO to a lesser extent became leaders of international conservation in the new era. International law was the instrument through which colonial governments, transnational non-governmental organizations, and influential Western individuals had put their everlasting imprint on the policies that guided international conservation after the Second World War. From the 1930s, the main tenet of conservation had been the delimitation of territories in which nature was absolutely protected from human intervention. The translation of this policy to Africa dictated that in this continent non-European nature ought to be protected from non-Europeans.

While development sought to eliminate wilderness, conservation paradoxically tried to preserve it. But African ‘wilderness’ was in reality a social construct, the result of applying on reality the conceptual prism through which colonizers had historically and misleadingly perceived Africa. So, in Africa, wilderness was created by acts of conservation imposed on the African landscape and on African peoples, refashioning them as a result.\textsuperscript{172} As aforementioned, the model of national parks without human habitation travelled from the U.S.A. to Africa. It was not the only U.S. influence on international conservation. During the first decades of the nineteenth century, scientific wildlife management became a new scientific discipline in the U.S., leading to the production of experts on conservation.\textsuperscript{173}

Trying to foster the authority of conservation policies by underlying their scientific respectability, colonial authorities turned to U.S experts for advice.\textsuperscript{174} With wildlife managers from the U.S. came the idea that human presence was incompatible with the preservation of nature in protected areas.\textsuperscript{175} But this

\textsuperscript{171} Neumann claims that in the African context in the period after the Second World War ‘there was a proliferation of scientific, multinational, non-governmental and quasi-governmental organizations with direct interests in the formation and implementation of wildlife conservation practices and policies in Africa. The result was a “second scramble for Africa” … conducted not by nation-states but by multi-and transnational organizations that sought control not over territory, but over nature conservation. As a consequence, control of the agenda of wildlife conservation and parks began to move away from the Colonial Office and individual territorial governments and increasingly into the hands of the international organizations’ scientists and resource managers.’ Ibid.

\textsuperscript{172} This is the general idea behind Roderick P. Neumann, \textit{Imposing Wilderness: Struggles over Livelihood and Nature Preservation in Africa} (Berkeley, University of California Press, 1998).

\textsuperscript{173} Neumann, ‘The Postwar Conservation Boom’, 33.

\textsuperscript{174} Ibid.

\textsuperscript{175} Adams, \textit{Green Development}, 281.
idea took some time to become hegemonic. At first, colonial governments regarded African habitation of national parks as an inevitable nuisance, which was acceptable and even recommended in order to preserve social stability.\textsuperscript{176} In time, however, under the new scientific outlook of conservation and increasing pressure from international conservation organizations, Africans were considered enemies of wildlife. For that reason, their presence in national parks was prohibited. From the mid-1950s, a panoply of U.S. organizations such as the National Science Foundation, the American Wildlife Management Institute, and the Fulbright Program sponsored U.S. experts on conservation to travel Central and East Africa to help colonial governments manage wildlife conservation.\textsuperscript{177}

Another basic aspect of wildlife conservation that came to Africa with the U.S. model was the importance of tourism. In the U.S., the creation of national park was related to the economic interests of the Northern Pacific railroad company.\textsuperscript{178} Recognizing the business opportunity presented by the expected affluence of visitors from the east of the U.S. to the western part of the country, the Northern Pacific lobbied the U.S. government to help adopt laws to create national parks.\textsuperscript{179} In time, tourism became a source of revenue that made conservation economically profitable.\textsuperscript{180} But in Africa there were no huge metropolitan areas where middle-class individuals choked by pollution and surrounded by jungles of asphalt and concrete dreamt of an escape to the wild.\textsuperscript{181} For that reason, the construction of trains and railways was economically unviable.

The British Colonial Office found the answer to the challenge of the economic viability of national parks in a newcomer to the African context: the airplane. The development of commercial aviation in the 1950s made African national parks an accessible tourist destination for wealthy Westerners.\textsuperscript{182} Because of tourism, conservation afforded Westerners not only the possibility of imposing their vision of wilderness in Africa but also the chance to create a new industry that was to prove enormously

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\item[176] See Neumann, \textit{Imposing Wilderness}, 125-126. According to Neumann, several colonial administrators openly criticized the encroachment of parks upon Africans’ hunting rights. Eventually, the lobbying capacity of the SPFE defeated any opposition.
\item[177] Neumann, ‘The Postwar Conservation Boom’, 33-34.
\item[180] Neumann, ‘The Postwar Conservation Boom’, 35.
\item[181] Ibid., 36.
\item[182] Ibid.
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profitable. From 1948 to 1949, U.S. tourists visiting British East Africa increased by 300 percent and generated revenue to the value of $1,200,000.

Having a firm institutional apparatus and a solid inner logic, international conservation was like a well-oiled machine. With deep colonial roots, it was also well ingrained in the apparently neutral international architecture of the post-war period. However, the approximation of independence made the watchdogs of conservation, and the IUCN especially, feel anxious about the prospect that African nations could impair the international work on conservation that had been done so far. More than any other protected area, the national park of Serengeti in Tanzania and the fate of the Maasai people within the park illustrates how international law and conservation interacted in the post-colonial period and the political dynamics that they generated.

When Major Richard Hingston travelled on his fact-finding mission to Africa he visited Tanganyika, the British name for what is today Tanzania. One of the concrete suggestions that he made at the time was the creation of the Serengeti national park. As he envisioned it, the park was to occupy a huge area, almost the size of Belgium. The influence of the SPFE on the British government soon helped transform the Serengeti from a game reserve into a national park, albeit one not as ambitious as Hingston had originally dreamt of. With the passing of the Game Ordinance in May 1940, Serengeti became the first such park in British colonial Africa. It soon acquired a symbolic value that superseded its mere biological importance, becoming a model for conservation for the whole of Africa and the rest of the world. Despite its importance, during the first years of existence the park suffered budget, staff, and operative capacity limitations.

In 1948, the British Legislative Committee issued the National Parks Ordinance, which included Serengeti as the first of its kind. Interestingly, the Ordinance did not prohibit human habitation of the park. But, respectful as it was to the entitlements of African societies, the fact that the Ordinance unilaterally declared the existence of a protected area without consultation with the African residents of

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186 Ibid., 129-130.

187 Ibid., 130.

188 Ibid., 131.
the park was enough reason to ignite conflict. Different African communities soon challenged the proposed boundaries, with the Maasai particularly resisting British encroachment on their hunting grounds. Despite what the Ordinance decreed, in practice, the park’s guards restricted Maasai’s hunting territories more and more.

The tension surrounding the question of human habitation of the Serengeti grew as colonization approached. On the one hand, the land question had provoked conflict and even violence in East Africa, so the British government wanted to proceed with caution with regard to Maasai’s lands. On the other hand, due to the symbolic value of Serengeti, U.S. and European international conservation organizations (with the SPEF again playing a prominent role) intensively pressured the British government to expel African residents from the park. The result was the 1958 National Parks Ordinance, which declared that human rights were to be excluded from African national parks. That meant, in other words, that human presence was completely banned in Serengeti and similar parks. In the following decades, the Serengeti model became the blueprint for international conservation of non-European nature worldwide. The Massai suffered the same fate of the millions of non-Europeans that were removed from their lands to make room for conservation.

The Ordinance that declared Serengeti a park without people was adopted just before Tanganyika started moving toward independence. A new era was beginning, and it was yet to be seen if the conceptual basis of international conservation, strongly rooted in the colonial era, was to survive once African independent nations took charge of the administration of their territories. The general feeling in Western international conservation circles was that African independence endangered the preservation of African wildlife, potentially spoiling the great work on conservation that had been undertaken in Africa and all around the world during the colonial era. To address this situation the IUPN, which in 1956 was renamed the International Union for Conservation of Nature and Natural Resources (IUCN), focused its lobbying capacity on the African continent. One of the initiatives of the IUCN was to launch the African Special Project, a plan destined to convince the public and, particularly, the new African political leaders about the importance of maintaining international conservation in Africa.

189 Ibid.
190 Ibid., 135.
191 Ibid., 137-138.
192 Ibid., 138.
193 Rachelle, Elephant Treaties, 51.
194 Neumann, Imposing Wilderness, 139.
The African Project soon bore fruit. In 1961, the IUCN organized a Symposium on the Conservation of Nature and Natural Resources in African States.\textsuperscript{195} The conference took place in Arusha, the capital of Tanganyika, months before the country gained independence from Great Britain. Tanganyika had also become the African sanctuary for the international movement of conservation, so the Conference was emblematic of IUCN’s attempt to try linking the colonial with post-colonial conservation.

During the conference, Tanzania’s first president, Julius Nierere, put forward what has been called the Arusha Manifesto, in which he committed his government to do everything that was in its power to guarantee the protection of African wildlife. Concretely, he stated that ‘the conservation of wildlife and wild places calls for specialist knowledge, trained manpower and money and we look to other nations to cooperate in this important task—the success or failure of which not only affects the Continent of Africa but the rest of the world as well’.\textsuperscript{196} Julius Nierere’s call for international assistance and international cooperation for conservation was music to the ears of international conservation organizations.

The lobbying capacity of the IUCN paid great dividends in Arusha. For instance, Nierere’s speech had been written by experts of Western conservation organizations.\textsuperscript{197} Despite the clear neo-colonial connotation of Western pressure on African nations, the agenda of conservation, as that of development, cannot only be presented as an external imposition. In most cases African governments gladly accepted conservation. There was an economic reason for this. African governments expected to obtain a much-needed income from tourism coming to enjoy national parks. In Tanzania, for example, developmental plans estimated that tourism would be the country’s second source of foreign revenue.\textsuperscript{198} There was also the symbolic value of national parks in Africa. Africa, a continent invariably pictured as a failure, a place of rampant poverty and strife, could now offer the world something to be proud of, something of enormous value that no other place could offer: areas of unspoiled wilderness where lions, elephants, and rhinoceroses roamed in complete freedom.

Convincing African authorities about the need to protect African nature from Africans was not the only way in which the IUCN sought to neutralize the threat that decolonization, and hence Africans’ control over their territories, posed to international conservation. A second maneuver was the internationalization

\textsuperscript{195} Adams, \textit{Green Development}, 35.
\textsuperscript{197} Raymond Bonner, \textit{At the Hand of Man: Peril and Hope for Africa’s Wildlife} (New York, Alfred A. Knopf, 1993) 65.
\textsuperscript{198} Neumann, \textit{Imposing Wilderness}, 143.
of the conservation agenda.\textsuperscript{199} This move had two aspects. On the one hand, placing conservation in international legal texts entailed transforming conservation into an international obligation, which would eventually tie the hands of independent nations. On the other hand, internationalization also implicated moving authority over conservation from African governments to international bureaucracies composed of Western experts and Western policy makers.

The first element of the process of internationalization envisaged by the IUCN produced the 1968 African Convention for the Protection of Nature and Natural Resources.\textsuperscript{200} In competition with the FAO, the IUCN—, which from 1966 was headed by one of the most prestigious U.S. conservation figures, Harold Jefferson Coolidge\textsuperscript{201}—played a fundamental role in the creation of the Convention. However, the IUCN worked mostly behind scenes, as having a Western organization, and one with colonial ties, dictating conservation in Africa was an extremely sensitive political issue at the end of the 1960s.\textsuperscript{202} The scope of the Convention was wider than mere conservation: it also paid attention to the preservation of natural resources, such as soil, water, etc. But, as the IUCN had wished the Convention to give international legal validation to the conservation model applied in Africa during the first half of the twentieth century, it was thus cemented as a blueprint for future initiatives.

Article X, for example, guaranteed that new countries were not going to modify the protecting areas that existed before the entry into force of the Convention within their territorial borders.\textsuperscript{203} Article VIII recognized the need to protect wildlife species and their habitats in the case that those species could become extinct.\textsuperscript{204} Finally, Article III of the Convention defined national parks as places exclusively dedicated to the preservation of nature, in which human activities were prohibited and animals could not be killed or disturbed.\textsuperscript{205} That, of course, was incompatible with the presence of Africans whose livelihoods depended on hunting and agriculture.

As important as the African Convention was, the IUCN still sought to consolidate a second element of internationalization: moving the management of biological resources from the national to the national to the

\textsuperscript{199} Rachelle, \textit{Elephant Treaties}, 54.
\textsuperscript{201} As aforementioned he was one of the founding members and the most important figure of the American Committee for International Wildlife Protection and one of the forces behind the Western Hemisphere Convention. See supra page 516.
\textsuperscript{202} Rachelle, \textit{Elephant Treaties}, 55-56.
\textsuperscript{204} Ibid., art. VIII, 8.
\textsuperscript{205} Ibid., art. III. 4 b) 2) and 3), 5-6.
international plane. That was the rationale behind the Convention Concerning the Protection for the World Cultural and Natural Heritage (World Heritage Convention). It is noteworthy that it was the threat to the conservation area of Ngorongoro and Serengeti that ultimately triggered the need for the Convention. Plans of the Tanzanian government to designate part of the Ngorongoro conservation area for agricultural development alarmed the IUCN and pushed it to act swiftly. Coolidge, the IUCN director, wrote personally to President Julius Nyerere to halt the government’s plan. In addition, Coolidge and the IUCN started work on a plan to establish an International Heritage Trust to protect world natural spaces of incalculable value such as Serengeti. The Trust was to be an international agency that would have the last word on deciding about the inviolability of natural sites that were considered part of the heritage of humanity.

IUCN’s ambitions were unrealistic in the 1970s, a time in which many non-European states pushed for a new international economic order and for absolute sovereignty over their natural resources. Moreover, UNESCO was finally successful in stealing the initiative from the IUCN and taking the lead toward the Convention.

Even though the Convention recognized that the final word about what sites were to become world heritage belonged ultimately to states (Article 3) and that the responsibility of preserving those sites belonged also to the state, it also committed states to seeking international assistance (financial, scientific, technical) to that end (Article 4). Moreover, Article 6 declared that, despite respecting state sovereignty, the cultural and natural heritage was also a world heritage ‘whose protection’ was ‘the duty of the international community’. Articles 4 and 6 constituted a clear ‘invitation’ to non-European states to surrender part of their territorial sovereignty to Western superior expertise in conservation. The cosmopolitan goal of preserving the world’s natural beauty demanded it.

The IUCN, an organization that as Rachelle has contended ‘emerged from colonialism’, had succeeded in internationalizing areas of conservation of outmost importance. Moreover, it managed to do

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207 Rachelle, Elephant Treaties, 58.
208 Ibid.
211 Rachelle, Elephant Treaties, 56.
so while hiding the connection between international and colonial conservation. Soon the IUCN was assisiting non-European states in managing hundreds of national parks around the world. To that end, the IUCN also created a World Wildlife Fund (WWF) in 1961, an international NGO that employs tens of thousands of peoples and control billions of dollars, giving it a hegemonic position in conservation. Thanks to this privileged position, it can participate in the management of thousands of conservation initiatives worldwide, especially in non-European states, most of which face huge budgetary constraints.

International conventions on conservation and the internationalization of the management of protected areas have assured Western hegemonic control over the international agenda of conservation in the post-colonial era. Through the agenda of conservation, non-European nature was re-appropriated, albeit for a contrary goal than development. Both agendas helped Western interests to re-appropriate and retain control over non-European nature after the Second World War. Conservation was the ‘little brother’ of development. Seemingly, it was the exception to the general plan of development launched by international organization in non-European states. But, while less expansive than development, conservation was nonetheless huge in territorial scale. In 2005 there were more than 100,000 protected areas worldwide, covering an areas bigger than 20 million square kilometers. This space represents 12.2 percent of the terrestrial area of the Earth, not an inconsequential amount of land and natural resources. Finally, development and conservation also had a similar disciplining effect over non-European populations who, in the case of conservation, were regarded as hazardous for the preservation of non-European wild fauna and flora. This characterization continued and even deepened in the era of sustainable development.

Concluding Remarks
When asked in the abstract about the relationship between international law and nature, international lawyers usually point out the existence of a branch of the discipline—international environmental law—devoted to the protection of nature. Under this light, international law is perceived as a positive instrument to counter the most exploitative tendencies and adverse effects of the global economic system on the environment. However, as this chapter has pointed out, international law has also supported the extension of an exploitative approach to non-European nature in the name of development. Moreover,

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international law’s managerial power over non-European territories has not been limited to the discourse of development. Conservation has also placed in the hands of international expert bodies control over immense regions of the world.

The hegemonic power that international law has given Western nations and elites over non-European nature is not a novel development. During the colonial era international law sponsored the appropriation, commodification, and exploitation of the non-European natural resources. Even though colonial rule formally ended in the second half of the twentieth century, international law allowed the continuation of Western hegemonic interventions on non-European nature through the discourses of development and conservation. Both were placed at the top of the international agenda after the Second World War. Their presence in some of the most significant international legal texts of the post-war era fostered their appeal and cemented their discursive and factual power.

International development and international conservation represented two contrasting approaches to non-European nature. While international development identified the thorough exploitation of non-European nature as the basis for the achievement of socio-economic progress and, accordingly, promoted its thorough transformation, international conservation emphasized the need for preserving non-European ecosystems. One urged to modify non-European nature thoroughly; the other urged no modification at all.

The international legitimation of development and conservation contributed to what this study has termed the conceptual appropriation of nature. This appropriation had historically translated into a power to define non-European nature and set the goals to which it ought to be employed. During the colonial era, non-European nature was viewed as deficient and thus in need of intervention. This pattern continued in the post-colonial era. By presenting non-European nature as an underutilized realm, the transformation of which was vital for post-war economic recovery and future world prosperity, development created an irresistible appeal for its exploitation. Conservation complicated that narrative. In contrast to development and by portraying non-European nature as a wild and endangered natural treasure, conservation strongly compelled the international community to preserve it.

Apart from their impact upon nature, development and conservation also had an important effect on non-European peoples. This was so because defining non-European ecosystems as either in need of protection or exploitation implied something about the people that inhabited them. The lack of development and, thus, of environmental exploitation of non-European territories indicated non-
European’s inability to master their ecosystems. Conversely, the need for absolute protection of African wildlife meant that Africans were detrimental to its preservation.

Development and conservation placed non-European peoples under the schizophrenic logic of two discourses that blamed them simultaneously for one and the contrary reason. While the discourse of development postulated that non-Europeans transformed or exploited nature too little, under conservation’s rationale non-Europeans were accused of transforming and exploiting nature too much. Under this double prism, the same non-European population, say the Tanzanian Maasai, could be judged simultaneously as underdeveloped and in need of intervention that would help them exploit nature efficiently and as impediments to conservation, thus in need of an intervention that would prevent their exploitation of nature.

Even though the discourses of development and conservation seemed to be based on a contrary logic, they ultimately produced the same result. They led to the conclusion that non-European nature ought to be taken away from the control of non-European populations and, instead, managed by Western actors, institutions, and experts who knew better. In so doing, both discourses transformed non-European peoples and non-European ecosystems into entities to be managed by powerful international bureaucracies that were supposedly in possession of the superior scientific and technological knowledge that would allow the bypassing of complex socio-economic and political questions and guide non-Europeans toward the good life.

International law was a vital component of this process. As an authoritative global scientific language, it allowed the taking of power to define the use of land and natural resources away from non-European states and placing it, instead, in the hands of international bureaucracies. Western international organizations and governments were in control of the international agenda of development and conservation and the international grammar through which it was articulated. This privileged and hegemonic position gave them a huge scope of influence over non-Europeans and their surroundings. The managerial power of development and cooperation fell upon non-European peoples, creating strikingly similar if deleterious results. For instance, millions of peoples in non-European states were removed or relocated both for developmental goals like the construction of large dams and conservation projects such as the creation of national parks. The lives of non-European peoples could be sacrificed for the achievement of higher goals.

Non-Europeans were managed and so were their surroundings. International expert bodies were also invested in efficiently reshaping non-European nature. The ultimate goal was to utilize and transform it
into a commodified realm for the maximization of wealth or, alternatively, into a profitable wilderness. Interestingly, the conceptual appropriation of nature foreshadowed its material appropriation. At the same time that Truman and Rostow linked economic underdevelopment with a lack of exploitation of non-European nature, they promoted private property, free trade, entrepreneurialism, and a business mentality as the best institutional and psychological mechanisms to reach the goal of development. Linked to the work of international organizations and nation states, conservation was also turned into a commodity to be enjoyed by tourists. Tourism was mostly managed by elite private operators and, consequently, it marginalized the local non-European peoples most negatively affected by conservation policies. The former benefited from the business opportunity offered by a growing trillion-dollar industry.\textsuperscript{214}

Apparently basing their foundations on diametrically opposing approaches to non-European people and nature, development and conservation logically legitimized different international agendas of action. However, as aforementioned, both discourses shared important conceptual premises at a deeper level. They both represented non-European nature as a wilderness. Only the aims of this representation and the interests behind it were different. Under development, non-European nature was seen as an expansive wilderness that ought to be circumscribed, controlled, and transformed into a commodified realm for economic exploitation. For conservation, non-European nature was a receding wilderness whose pristine majesty ought to be maintained at all costs. Both rationales were able to operate only by imposing wilderness on non-European nature, either in order to eliminate it or safeguard it.

Similarly, the seeming paradox that non-European peoples could be simultaneously unable to master nature and capable of destroying it was dissolved by the redefinition of the very condition of underdevelopment and poverty. The economic primitive life that, for Truman and modernization theory, was the cause of underdevelopment could be redefined as the reason that also pushed non-Europeans to destroy nature. That was a great ‘conceptual discovery’, one that took place with the emergence of the concept of sustainable development. Point four of the Stockholm Declaration on the Human Environment declared that ‘in the developing countries most of the environmental problems are caused by underdevelopment’.\textsuperscript{215} In other words, the poor, apart from delaying economic progress, were destroying nature due to their underdevelopment.

\textsuperscript{214} See supra footnote 183.

Once poverty was presented as simultaneously encapsulating the incapacity to make nature productive and the inability to preserve it, international law could repackage the—by then strongly criticized—programs of development and conservation into a single and more palatable program that corrected both anomalies at the same time. The vernaculars of development and conservation fused into the novel concept of sustainability. Accordingly, point four of the Stockholm Declaration compelled developing countries to direct their efforts to both ‘safeguard and improve the environment’. The underlying implication of this discursive maneuver is the—by now familiar—(re)production of a deficiency to be corrected: because of their poverty, non-European peoples did not know how to relate to nature in order to create sustainable societies and sustainable livelihoods. This conclusion created a seemingly new and compelling appeal to re-educate non-Europeans and take control of their societies for the betterment of the Earth and human life on it. So, once again, international law could deploy its authoritative language to finally bring about a sustainable and progressive global life. In so doing, it continued a long-standing line of historical interventions in non-European territories that have failed to yet deliver the promised results. Unluckily, the price of this failure has not been inconsequential. Those interventions have created and (as I write these lines) continue to create immense ecological and human suffering. Hopefully, this study can bring awareness about this situation and make a contribution toward putting an end to it.


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